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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1986

STATE OF CALIFORNIA, ex rel. STATE LANDS COMMISSION,
Petitioner,

vs.

UNITED STATES OF AMERICA, et al.,
Respondents.

**Petition For a Writ of Certiorari to the
United States Court of Appeals
For the Ninth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under the equal footing doctrine the State of California became the owner of the bed and waters of Mono Lake upon its admission to the Union in 1850. As a result of the diversion of the lake's feeder streams by the City of Los Angeles, nearly 12,000 acres of Mono Lake's bed have been uncovered. One of the owners of the upland adjoining the uncovered bed is the federal government. It claims that a separate federal rule must be used to determine ownership of the uncovered bed as between it and the State.

1. Whether special federal property rules, separate from the rules applied to other upland owners, must always be used to resolve title disputes between the States and the federal government concerning lands beneath inland navigable waters, despite the holding in *Wilson v. Omaha Indian Tribe*, 442 U.S. 653 (1979), in which state law was borrowed as the rule of decision.
2. Whether, assuming that a separate federal rule had to be used, the Ninth Circuit erred in concluding that there was an established federal common law rule of reliction, that this rule must govern the ownership of lake bed that has been uncovered by intentional diversions or drainage, and that the uncovering of Mono Lake was "gradual and imperceptible" within the meaning of this rule.

PARTIES BELOW

1. The State of California, acting by and through the State Lands Commission, an agency of the State of California, is the petitioner.
2. The respondents are the United States of America, various federal officials (the Secretary of the Interior, the Secretary of Agriculture, the Director of the Bureau of Land Management, the Chief of the United States Forest Service, the California State Director for the Bureau of Land Management, and the Regional Forester, California, United States Forest Service), and the intervenors, the Sierra Club and the Natural Resources Defense Council.

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The petitioner, State of California, ex rel. State Lands Commission, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 805 F.2d 857 and is reprinted in Appendix (App.) A. The pertinent decisions of the district court, all unreported, are reprinted at Appendices B, C, and D.

JURISDICTION

The district court found that it had jurisdiction under 28 U.S.C. section 1346(f). The judgment of the Court of Appeals was

entered on December 2, 1986 and a timely petition for rehearing and suggestion for rehearing en banc was denied on January 30, 1987. See Appendix E. The jurisdiction of the Court is invoked under 28 U.S.C. section 1254.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

1. The Submerged Lands Act, 43 U.S.C. §§ 1301-1315, is reprinted in Appendix F.

STATEMENT OF THE CASE

This is a quiet title action to determine the ownership of those portions of the uncovered bed of Mono Lake that are adjacent to upland property owned by the United States.

A. Factual Background

Mono Lake is a navigable lake lying immediately east of the Sierra Nevada in eastern California, occupying the lowest portion of the Mono Basin. Court Exhibit (Ct. Ex.) 2-A at 3. Upon its admission to the Union in 1850, California under the equal footing doctrine became the owner of the bed and waters of navigable Mono Lake below its ordinary high water mark. E. g., *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977); *Shively v. Bowlby*, 152 U.S. 1 (1894); *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845). Similar to many other lakes in the western United States, Mono Lake is a "terminal" lake; such a lake has no outlet and loses water only by evaporation. Ct. Ex. 2-A. The United States owns about 60%-70% of the upland surrounding the lake bed. Def. Ex. T. Intermingled among the parcels of federally-owned upland are upland parcels owned by the City of Los Angeles, the State of California, and private parties. *Id.*

During the late 1920's, the City of Los Angeles developed plans to divert water from the Mono Basin to augment its water supply system. It was no secret that the proposed diversions of the Lake's primary tributaries would result in the uncovering of Mono Lake. This was apparent to Congress when it withdrew approximately

370,000 acres of land in the area surrounding Mono Lake from entry and disposal under the public land laws for the primary purpose of protecting Los Angeles from claims by persons who might settle on federal lands and object to the diversions. Act of March 4, 1931, 46 Stat. 1530; see, e.g., Clerk's Record (CR) 91 at 11-17. During the debate on the Act of March 4, 1931, Congress repeatedly was made aware that Mono Lake would substantially recede or dry up as a result of the proposed diversions. Hearings Before the Senate Committee on Public Lands and Surveys, 74th Cong., 1st Sess. at 34, 37, 43, and 45 (1931). The Act's legislative history contains no mention of the reliction doctrine nor any suggestion that the United States would own the future exposed bed of Mono Lake.

Two years later, in 1933, the United States Department of the Interior did directly address the question of the future ownership of the land that would be uncovered by the impending diversions. In response to an inquiry by the City of Los Angeles, the Department stated that state law governed the extent of the riparian rights of the shore owners, and that, under California law, "if the lands now under the waters of Mono Lake become permanently exposed, ownership thereto will be vested in the State of California." CR 91 at 18-19. California acknowledged in writing the Department's opinion. *Id.* at 19-20. There is no evidence that the United States repudiated its acceptance of state law as Mono Lake receded over the next 40 years.¹

The Interior Department's opinion that California would retain the bed of Mono Lake as it became uncovered was based on the Department's published 1917 opinion regarding the uncovered bed of nearby Owens Lake. 23 Pub. Lands Dec. 68 (1917); CR 91 at 5-6. In this opinion, the Department stated that the upland ownership rights of all riparian owners were controlled by the law of the individual state. *Id.* Referring to California law that reserves title to lake bed which has been uncovered by drainage in the owner of the bed (the same state law relied upon by

¹ The United States did not assert a claim to the uncovered bed of Mono Lake until the 1970's, although California asserted its ownership in the interim. E.g., CR 91 at 24, 26.

California here), the Department concluded that the lands of Owens Lake that had been uncovered by diversions since the date of California's admission into the Union "are not in any sense public lands of the United States . . ." CR 91 at 5-6.

Against this backdrop, California in 1940 issued a permit to the City of Los Angeles under which the City commenced diversions of the four major streams that are tributary to Mono Lake. Ct. Ex. 2-A at 51-55. At the time that diversions commenced in November 1940, the lake stood at an elevation of approximately 6417 feet above mean sea level and covered 55,000 acres. Ct. Ex. 2-C at F-661. These diversions have since led to the substantial recession of the lake. At the time of trial in 1985, the lake stood at approximately 6380 feet and covered about 43,275 acres, nearly 12,000 acres having been exposed since 1940. *Id.* at F-672. But for diversions, the level of Mono Lake today would stand only slightly below 6430 feet and, therefore, greatly above the 1940 level of 6417 feet. Ct. Ex. 2-A at 60-61, 82-83. The lake's decline is therefore wholly attributable to diversions from the Mono Basin. Public awareness of this dramatic decline has spawned a series of environmental actions designed to protect Mono Lake. E.g., *National Audubon Society, v. Superior Court*, 33 Cal.3d 419, 189 Cal.Rptr. 346, 658 P.2d 709, *cert. denied*, 464 U.S. 977 (1983).

If California prevails in this litigation, the entire uncovered bed of Mono Lake would belong to California and would be managed as part of the Mono Lake Tufa State Reserve, Cal. Pub. Resources Code §§ 5045-49. If the United States prevails, the uncovered bed would be a "checkerboard" of federal and state-owned lands. The federal portion of the uncovered bed would be separately managed as part of the Mono Basin National Forest Scenic Area, Title III of P.L. 98-425, 98 Stat. 1619, with the remainder of the uncovered bed continuing to be owned and managed by California under state law.

B. Proceedings Below

Upon cross-motions for summary judgment, the district court determined that federal law applied and, further, that federal law required use of federal common law, not state law, as the rule of

decision. App. B. The district court's choice of law was based on *California ex rel. State Lands Commission v. United States*, 457 U.S. 273 (1982) (hereafter *California v. United States*), in which this Court held that federal common law controlled the ownership of coastal accretions because coastal accretions had been retained in section 5(a) of the Submerged Lands Act of 1953, 43 U.S.C. § 1313(a). The district court found that section 5(a) also required the use of federal common law in this case because section 5(a) did not distinguish between coastal and inland waters. App. B at A-22. The district court attempted to distinguish *Wilson v. Omaha Indian Tribe*, 442 U.S. 653 (1979), a dispute along inland waters in which the Court borrowed state law, as a case involving "intermediate" issues of title, whereas, according to the district court, this case and *California v. United States* involved "determinative" questions of title. App. B. at A-27.

The district court then assumed that a "reliction" doctrine controlled the ownership question under federal common law, but was unable to find that the recession constituted a reliction on the factual record before it. *Id.* at A-30-32. It therefore set the case for trial to determine whether, under federal common law, a reliction had occurred.

At trial, the parties disputed the existence, content, and application of federal common law, and to support their respective positions, they presented detailed information about the physical condition of the Lake and its environment, the history of Los Angeles' diversions and the effect of diversions upon the level of the Lake, and the rate of shoreline movement at various "profiles" around the Lake. At the close of trial, the district court found that the uncovering constituted a "gradual and imperceptible" reliction under its view of federal common law. App. C at A-44. In ruling for the federal government, the district court nevertheless characterized this as the kind of case where the trial judge "knows beyond reasonable doubt and to a moral certainty that he is a mere way stop on the way to the Supreme Court." RT at 979.

On appeal, the Ninth Circuit affirmed. The Ninth Circuit accepted the district court's view and found that federal law required use of federal common law rules under its reading of *California v. United States* because section 5(a) of the Sub-

merged Lands Act applied to both coastal and inland waters. App. A at A-6. The Ninth Circuit's attempt to distinguish *Wilson*, however, proceeded on an entirely different basis.² Apparently overlooking the fact that Iowa's claims were based on the equal footing doctrine, *Wilson*, 442 U.S. at 657 n. 2, the Ninth Circuit stated that *Wilson* only involved a dispute between the United States as a riparian upland owner and the State of Iowa acting as an upland owner. App. A at A-6-8. From this premise, the Ninth Circuit announced the following distinction: where a State's claim against the federal government is based on the State's riparian upland ownership, state law should be borrowed under the rule in *Wilson*; where, as here, a State's claim against the federal government is based on the State's ownership of sovereign lands, the Submerged Lands Act "mandates" that federal common law supply the rule of decision. *Id.* The Ninth Circuit further stated that even were it to apply the *Wilson* balancing test, the *Wilson* test would require adoption of federal common law because it was possible that a State "could adopt property rules that would always award disputed land to the submerged land owner and thus that would always be injurious to the interests of the United States." *Id.* at A-8, 10 (emphasis added). The Ninth Circuit reached this conclusion without discussing California law, without addressing whether California law was actually hostile to federal interests, and without undertaking the three-part balancing test prescribed by *Wilson*.

Next, applying what it termed a "well-settled" federal common law of reliction to the facts at hand, the Ninth Circuit upheld the district court's conclusion that the uncovering of Mono Lake was gradual and imperceptible. In doing so, the Ninth Circuit rejected California's arguments about the appropriate content of federal common law, assuming that state law was not to be applied. First, it rejected California's contention that the common law employs a "drainage" rule, and not the reliction doctrine, where lakes are uncovered by intentional diversion or drainage. *Id.* at A-9. Second, it rejected California's alternative argument that if a reliction

² On appeal, neither the United States nor the intervenors defended the district court's attempt to distinguish *Wilson* on the basis of "intermediate" and "determinative" questions.

doctrine applies, the district court misapplied the test for determining whether changes were gradual and imperceptible because the district court's test was based solely on whether a person was capable of seeing shoreline movement at an instant of its occurrence.³

The Ninth Circuit thereafter rejected California's petition for rehearing and suggestion for rehearing en banc in which, inter alia, California argued that the panel's decision conflicted with three other cases in which the Ninth Circuit borrowed state law as the rule of decision to resolve boundary disputes involving federal property along inland navigable waters.⁴

REASONS FOR GRANTING THE PETITION

This Court has long recognized the importance of the choice of law question presented by these recurring boundary disputes along the shores of navigable waters. See *California v. United States*, 457 U.S. 273; *Wilson v. Omaha Indian Tribe*, 442 U.S. 653; *Oregon ex. rel. State Lands Board v. Corvallis Sand and Gravel Co.*, 429 U.S. 363 (1977) (hereafter "Corvallis"), overruling *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973). The primary issue presented by this petition is whether, as the Ninth Circuit held, the Submerged Lands Act automatically and unconditionally requires the use of separate federal rules to resolve boundary

³ The Ninth Circuit attempted to avoid this issue by indicating that the two "average" rates of shoreline migration contained in the district court's findings supported the district court's conclusion even under California's version of the test because these two average rates were in no way comparable to the avulsion of a river. App. A at A-12. By testing these averages against the concept of an avulsion, however, the Ninth Circuit implicitly adopted the district court's test that a recession is gradual and imperceptible unless the recession is an avulsive movement visible at an instant of its occurrence.

⁴ See *Puyallup Tribe of Indians v. Port of Tacoma*, 717 F.2d 1251, 1261 n. 11 (9th Cir. 1983), cert. denied, 104 S. Ct. 1324 (1984); *United States v. Aranson*, 696 F.2d 654, 658 (9th Cir.), cert. denied, 464 U.S. 982 (1983); *United States v. Harvey*, 661 F.2d 767, 770-71 (9th Cir. 1981), cert. denied, 459 U.S. 833 (1982).

disputes along inland navigable waters between the United States and a State claiming on the basis of its ownership of sovereign lands. The Ninth Circuit's holding is not only in irreconcilable conflict with *Wilson*, but represents an unwarranted and unprecedented expansion of federal common law into areas of traditional state concern. This Court's review is essential.

Wilson was also a title dispute between a State and the United States involving the bed of inland navigable waters. Applying a three-part balancing test, this Court held that federal law ordinarily must borrow state law as the rule of decision. Despite *Wilson*'s clearly expressed preference for the use of state law, the Ninth Circuit determined here that sections 5(a) of the Submerged Lands Act, 43 U.S.C. § 1313(a), "mandates" the creation of federal common law rules to resolve boundary disputes between the United States and the States along inland navigable waters whenever the State's claim is based upon its ownership of sovereign land. The Ninth Circuit attempted to reconcile this apparent conflict with *Wilson* by limiting *Wilson*'s adoption of state law to those rare federal/state boundary disputes in which a State's claim is based upon riparian ownership.

In reaching this conclusion, the Ninth Circuit chose to disregard the reason why the borrowing of state law in this case is compelled by both *Wilson* and *California v. United States*. A federal common law rule of decision was arguably required in *California v. United States* because that case involved accretions to *coastal* lands that were reserved from the Act's grant of submerged coastal lands to the States. *California v. United States*, 457 U.S. at 283, 287. *Wilson* and this case, however, involve State sovereign claims to lands underlying *inland* navigable waters that the States have always owned since the dates of their respective admissions into the Union under the equal footing doctrine. E.g., *Corvallis*, 429 U.S. at 373-74; *Pollard's Lessee v. Hagan*, 44 U.S. at 223. The Act does not provide the basis for the State's ownership of lands underlying inland waters, and therefore cannot provide, and was not intended to provide, a basis for the use of federal common law in disputes regarding them. *Corvallis*, 429 U.S. at 371-2 n.4. In urging this distinction between coastal and inland waters California is in good company: the Solicitor General

advocated the very same distinction to this Court in *California v. United States*. See *infra* at 14-15.

In contrast, the Ninth Circuit's attempt to distinguish *Wilson* is contrived and unsupportable. The Ninth Circuit's analysis of *Wilson* was wholly dependent on its assumption that Iowa's claims were based solely on its riparian ownership. App. A at A-6-8. *Wilson*, however, unmistakably involved sovereign, equal-footing claims by Iowa. *Wilson*, 442 U.S. at 657 n. 2. The Court in *Wilson* did not even mention the Submerged Lands Act, much less find that it "mandated" federal common law rules. Moreover, there is not a word in *Wilson* to suggest that its choice of law analysis depended on whether a State's claims were based on riparian, as opposed to sovereign, ownership.

Although the need to eliminate this conflict with its past decisions is reason enough for the Court to accept this case, the long term danger of the Ninth Circuit's opinion may reside in its unrestrained and uncritical embrace of federal common law in an area where the Court has urged a considered balancing of interests tempered with a respect for the States' interest in administering their own law, especially property law. Apparently determined to forge a federal common law rule that would "protect" federal interests, the Ninth Circuit radically departed from this Court's approach. Thus, rather than perform the balancing required by *Wilson*, the Ninth Circuit adopted an unconditional rule requiring the use of federal common law. And, disregarding *Wilson*'s requirement that there be "concrete evidence" that state law would adversely effect federal interests, *Wilson*, 442 U.S. at 673, the Ninth Circuit refused to discuss the content of state law, refused to identify specific federal interests, refused to consider whether state law was in fact hostile to federal interests, and refused to address California's showing that federal interests would not be harmed by a state rule of decision. Instead, the Ninth Circuit adopted a conclusive presumption against the use of state law merely because it was possible that state law "could" injure federal interests.

As a result, the Ninth Circuit has now created a dual system of property law. In disregard of *Wilson*'s policy that there is "little reason why federal interests should not be treated under the same

rules of property that apply to private persons holding property in the same area by virtue of state, not federal, law," *Wilson*, 442 U.S. at 672, separate federal rules must now govern title disputes involving inland navigable waters between the federal government and the States, even in the absence of evidence that the state law that will apply to all other disputes is hostile to federal interests. What this means—as evidenced in Part II of this petition—is that, regardless of the Court's admonition in *Wilson* that it found "no imperative need" to create uniform property rules, *Wilson*, 442 U.S. at 673, federal courts will now be required to develop uniform principles of federal real property law that will somehow be capable of application on a nationwide basis, despite the variety of physical and political conditions that exist in different regions of this country.

The irony in all this is that the Ninth Circuit found the justification for its revolutionary approach to principles of federalism in the Submerged Lands Act. With respect to lands underlying inland waters, the Act was merely an emphatic confirmation of the States' preexisting and undisputed ownership of these lands under the equal footing doctrine. E.g., *Corvallis*, 429 U.S. at 371-72 n.4. The manner in which the Ninth Circuit has twisted the Act's unequivocal support of the States into a tool for subjecting their sovereign interests to a regime of federal common law vividly demonstrates the extreme and urgent need for this Court's intervention.

California respectfully requests that the Court grant its petition for a writ of certiorari.

I

THE NINTH CIRCUIT'S OPINION CONFLICTS WITH THE HOLDING IN *WILSON* THAT FEDERAL LAW SHOULD ORDINARILY BORROW STATE LAW AS THE RULE OF DECISION TO RESOLVE DISPUTES INVOLVING FEDERAL PROPERTY ALONG INLAND NAVIGABLE WATERS.

A. *Wilson* and *California v. United States*—an Overview

Wilson v. Omaha Indian Tribe involved, in part, a title dispute between the State of Iowa, as owner of the river bed, and the Omaha Indian Tribe, as owner of the uplands, over land created by a shift in the Missouri River. The issue was whether the changes in the river were “accretive” or “avulsive.” Because the United States had never yielded title or terminated its interest in the upland property that it held in trust for the Indians, the Court held that the Indians’ right to the property depended on federal law. *Wilson*, 442 U.S. at 670-71. Even though federal law was controlling, however, this did not necessarily mean that a federal common law rule must decide the outcome:

“[c]ontroversies . . . governed by federal law, do not inevitably require resort to uniform federal rules . . . Whether to adopt state law or to fashion a nationwide federal rule is a matter of judicial policy dependent upon a variety of considerations always relevant to the nature of the specific governmental interests and to the effects upon them of applying state law”. *Id.* at 671-72, quoting *United States v. Kimbell Foods, Inc.* 440 U.S. 715, 727-728 (1979), quoting *United States v. Standard Oil Co.*, 332 U.S. 301 (1947).

This choice of law question required consideration of whether there is need for a nationally uniform body of law to apply in situations comparable to this, whether application of state law would frustrate federal policy or functions, and whether a federal rule would have an impact on existing relationships under state law. *Id.* at 672-673. Applying this three-part test, the *Wilson* court held that state law, and not federal common law, should supply the rule of decision to determine ownership of the newly-created land.

"We perceive no need for a uniform national rule to determine whether changes in the course of a river affecting riparian land owned or possessed by the United States or by an Indian tribe have been avulsive or accretive. For this purpose, we see little reason why federal interests should not be treated under the same rules of property that apply to private persons holding property in the same area by virtue of state, rather than federal law. It is true that States may differ among themselves with respect to the rules that will identify and distinguish between avulsions and accretions but as long as the applicable standard is applied evenhandedly to particular disputes, we discern no imperative need to develop a general body of federal common law to decide cases such as this, where an interstate boundary is not in dispute. We should not accept 'generalized pleas for uniformity as substitutes for concrete evidence that adopting state law would adversely affect [federal interests].'" *Wilson*, 442 U.S. at 673, quoting *United States v. Kimbell Foods, Inc.*, 440 U.S. 730.

California v. United States, 457 U.S. 273, involved ownership of accretion along the ocean boundary of a United States Coast Guard reservation. The Court first held that federal law applied because, as in *Hughes v. Washington*, 389 U.S. 290 (1967), the dominant federal interest in international relations required application of federal law to govern oceanfront shoreline changes. *Id.* at 282. The Court also found that, as in *Wilson*, this was a case in which the United States had never parted with title or terminated its interest.

The Court then considered whether federal law should adopt state law or federal common law as the rule of decision. The Court chose federal common law, finding that Congress in section 5(a) of the Submerged Lands Act, 43 U.S.C. § 1313(a), had addressed ownership of the lands in dispute because it withheld "from the grant to the States all 'accretions' to coastal lands acquired or reserved by the United States." *Id.* at 283. This federal statutory directive "foreclosed" application of state law. The Court also stated that this was "not a case in which federal common law must be *created*," because it was settled under

federal law that the upland owner had a right to future accretions. *Id.* at 284 (emphasis in original). The Court distinguished *Wilson* as a case where there was no statutory directive and no special federal concerns. *Id.*

California has assumed for purposes of argument that, under *Wilson*, federal law should be applied in the first instance because the United States has not terminated its interest in the uplands surrounding Mono Lake. That does not answer the question whether federal law should adopt a federal or a state rule of decision. *Wilson* and *California v. United States*, read together, provide two dispositive reasons why state law must be borrowed here.

B. Section 5(a) of the Submerged Lands Act Does Not Require Use of Federal Common Law Rules in Boundary Disputes Involving Inland Navigable Waters That the States Own Under the Equal Footing Doctrine

First, the Submerged Lands Act is not implicated in actions such as this and *Wilson*, which involve state claims to *inland* navigable waters.

It is undisputed that, under the equal footing doctrine, title to lands beneath inland navigable waters and tidewaters passed to the new States upon their admission to the Union. E.g., *Pollard's Lessee*, 44 U.S. at 229; *Weber v. Board of Harbor Commissioners*, 85 U.S. (18 Wall.) 57, 65-66 (1873). For many years, it was generally thought that the States also owned the submerged coastal lands within the three-mile limit. After the Court decided in *California v. United States*, 332 U.S. 19 (1947), that the federal government had "paramount rights" to these submerged coastal lands, Congress enacted the Submerged Lands Act in order to establish with certainty the States' ownership of these coastal lands. E.g., H.Rep. No. 1778, 80th Cong., 1st Sess (1948), reprinted in 1953 U.S. Code Cong. & Ad.News 1417; 99 Cong. Rec. 2526, 2564, 2584, 2830 (1953). At the same time that it "granted" these submerged coastal lands to the States, the Act gratuitously confirmed undisputed state ownership of lands underneath inland navigable waters. E.g., *Corvallis*, 429 U.S. at 371-72, n.4; *Bonelli Cattle Co.*, 414 U.S. at 324 n.6.

With this background in mind, it is perfectly understandable why the Submerged Lands Act does not direct the creation of federal rules of decision in cases such as this and *Wilson*, which involve disputes along inland navigable waters. Because the States' claims to lands underlying inland waters are derived from the equal footing doctrine, not the Submerged Lands Act, the Act does not come into play in disputes involving inland waters. The fact that federal property adjoining inland waters may fit within the literal scope of section 5(a) cannot provide a basis for the creation of federal common law, because the Act, as merely a confirmation of existing law regarding inland waters, was clearly not intended to alter existing rights to such lands and could not generate the need for federal rules where state law otherwise would control. The Ninth Circuit's contrary conclusion imputes to Congress an intent to enhance federal claims to lands adjoining inland waters at the expense of the States, a result in utter contradiction of Congress's obvious intent to foster state ownership and control of these lands by confirming the State's undisputed title. E.g., 43 U.S.C. § 1311. All of this explains why the Submerged Lands Act was never mentioned in *Wilson*.

Indeed, the very argument made by California here was advanced by the Solicitor General of the United States in California v. United States:

"With respect to lands underlying *inland* navigable waters, state title may reach beyond the limits defined in the Submerged Lands Act, because that statute cannot restrict a constitutional grant or reservation at statehood. That is, in effect, the holding of *Corvallis*, which recognizes that a state may, by local law rule, retain once submerged lands that the Submerged Lands Act does not embrace. But no similar result is possible along the open sea. In light of the consistent holdings of this Court since the first *California* case that coastal states held no title to the seabed, the *only* basis for a state claim to lands now or previously underlying the open sea is the Submerged Lands Act of 1953. And, as we have seen, that grant does not encompass former water bottoms which, through accretion, have become attached to the upland." *California ex rel. State Lands Commission v.*

United States, No. 89 Original, Brief of the United States at 15. (Emphasis in original.)

California v. United States itself fully supports this analysis. The use of federal common law rules arguably was necessitated in *California v. United States* because that case involved “accretions to coastal lands” that had been withheld from the grant to the states in the Submerged Lands Act. 457 U.S. at 283 (emphasis added); the interpretation of a federal grant may raise federal concerns, *id.* at 287; see *Packer v. Bird*, 137 U.S. 661, 669-70 (1891). In arriving at this conclusion, however, the Court gave no indication that it also thought that section 5(a) required creation of federal rules to settle disputes involving inland waters. Instead, repeatedly distinguishing between “granted” coastal lands and “confirmed” lands underlying inland waters, 457 U.S. at 283, 285, 287, the Court expressly found that no “statutory directive” and no federal interests had been implicated in *Wilson*. *Id.* at 283-84; see also *Corvallis*, 429 U.S. at 363 n. 6.

Therefore, although the Act mentions and confirms title to lands beneath inland waters, the Act provides no basis to require the use of federal common law in disputes in regarding their ownership.

C. Like *Wilson*, This Is a Case Where There Are No Settled Federal Common Law Rules to Characterize Physical Shoreline Changes

Although the preceding analysis is dispositive, there is a second distinction between *California v. United States* and *Wilson* that also strongly weighs against the use of federal common law. In *California v. United States*, both parties agreed that the buildup of land physically constituted an accretion, 457 U.S. at 287, and the only issue was who owned the undisputed accretion. In that circumstance, the Court could apply a rule awarding accretion to the upland owner. *Id.* at 284. In *Wilson*, however, where there was disagreement about the characterization of the physical shoreline changes, the Court found “no imperative need” to develop a body of federal law to characterize whether changes caused by the Missouri River were “accretive or avulsive.” *Wilson*, 442 U.S. at 673. Taking the cases together, the Court is stating a policy

against the development of a federal common law of real property except in instances where federal common law is already well-established and its use is otherwise indicated. In this regard, the Court is simply carrying forward its general policy disfavoring the creation of federal common law. E.g., *Milwaukee v. Illinois*, 451 U.S. 304 (1981); *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).⁵

In this case, the parties disputed whether the uncovering of Mono Lake constituted a reliction, just as the parties in *Wilson* disputed whether the changes to the Missouri River constituted an accretion. There is no “settled” federal common law setting forth the standards for determining what constitutes the reliction of a navigable lake. See *infra* at 20-21. Indeed, the absence of settled federal common law rules is much more apparent in this case than *Wilson*. There is a fair body of federal case law involving changes on navigable rivers because of the frequency of interstate boundary disputes. See, e.g., *Nebraska v. Iowa*, 143 U.S. 359 (1892). In contrast, federal case law involving the characterization of shoreline changes on navigable lakes is virtually non-existent. *Infra* at 20-21.

D. The Ninth Circuit’s Opinion Cannot Be Reconciled With *Wilson*

As previously noted, *supra* at 6, 9, the Ninth Circuit’s attempt to distinguish *Wilson* as a case involving state riparian claims (as opposed to state sovereign bed claims), App. A at A-6-8, fails for the simple reason that the State of Iowa in *Wilson* relied on its sovereign title under the equal footing doctrine to support its claim to the lands created by a shift in the river. *Wilson*, 442 U.S. at 657 n. 2.

⁵ Although the absence of existing federal common law is a factor that weighs against its creation, it does not necessarily follow that the existence of an established federal rule requires that federal common law control. See *United States v. Aranson*, 696 F.2d 654 (9th Cir. 1983) (federal law borrows state law to determine ownership of newly-created land, even where there is no dispute that the land is the product of accretion).

Even if *Wilson* and this case were factually distinguishable, the Ninth Circuit's conclusion that the Submerged Lands Act requires a federal common law rule to govern state sovereign claims against the federal government leads to outlandish and conflicting results. Under the Ninth Circuit's analysis, for example, in a boundary dispute involving a State as owner of the river and the United States and a private party as upland owners on opposite banks, the United States' claim against the private party that the river shift was "accretive" would be determined as a matter of state law, while the United States' claim against the State involving the *identical* physical change would be governed by federal common law. The Ninth Circuit offered no reason why Congress would have desired such a result, and every policy reason in *Wilson* dictates against it. See *Wilson*, 442 U.S. at 674.

The Ninth Circuit's alternative holding also conflicts with *Wilson*. Refusing to analyze the three *Wilson* factors, see *supra* at 11, the Ninth Circuit indicated that it would reach the same result even were it to apply the *Wilson* balancing test, because the state, as the owner of the Submerged bed, "could" adopt rules that are injurious to federal upland interests. App. A at A-8.⁶

The Ninth Circuit did not state what California law is, and, therefore, never even suggested that application of California law would be hostile to federal interests.⁷ It completely ignored

⁶ The Ninth Circuit's initial assumption is factually mistaken: the parties *will not* always occupy the same relative positions, because the United States may own the beds of navigable waters. In *Puyallup Tribe of Indians*, 717 F.2d 1251, for instance, the federal interest (the Puyallup tribe) owned the bed of the river and the Port of Tacoma owned the upland. The tribe, taking advantage of favorable state law on the definition of avulsion, prevailed in the litigation. In California itself, the United States appears to own the beds of three navigable lakes and could benefit from state law regarding ownership of uncovered lake beds. See Cal. Stats. 1905, ch. VI, p.4 (cession of uncovered lake lands by state); 33 Stat. 714 (1905) (acceptance by United States).

⁷ Because the Ninth Circuit failed to address these issues, a full exposition of California law, and why it is not hostile to federal interests, must await a brief on the merits. Briefly stated, under California law, which follows common law decisions, *infra* at 21, the uncovering of lake

California's concrete historical evidence that federal interests would not be harmed by a state rule.⁸ Instead, it relied on the theoretical possibility that a State "could" adopt property rules that benefit the owner of the submerged lands. The Ninth Circuit in effect conclusively presumed that the States will adopt rules that discriminate against federal interests. This approach is directly contrary to *Wilson*: "We should not accept 'generalized pleas for uniformity as substitutes for concrete evidence that adopting state law would adversely affect [federal interests]'." *Wilson*, 442 U.S. at 673, quoting *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 730 (1979).

beds by a drainage of their waters does not constitute reliction and continues to belong to the owner of the bed. Cal. Stats. 1893, Chap. 229, p. 341 (Cal. Pub. Res. Code § 7601). The uncovering of Mono Lake is such a drainage. *City of Los Angeles v. Aitken*, 10 Cal.App.2d 460, 52 P.2d 585, 587, 590 (1935). Any claim that application of this California law here would be hostile to federal interests would be futile: (1) it is applied evenhandedly to private and public upland interests, see *Wilson*, 442 U.S. at 673; (2) it is consistent with the practice of the majority of states that do not apply the reliction doctrine to intentionally uncovered or drained lands, *infra* at 21; (3) for more than 50 years, federal officials managed federal lands in California with the understanding that California owned uncovered lake beds under California law without ever suggesting that state law was hostile, *supra* at 3-4; and (4) contrary to the assumption of the Ninth Circuit that the states and the federal government will always occupy the same relative positions, App. A at A-8, the federal government may benefit from the California law of uncovered lake beds. *Supra* at 17 n.6.

Even if the reliction doctrine governed this situation under California law, the uncovering of Mono Lake would not be gradual and imperceptible. See *People v. William Kent Estate Co.*, 242 Cal.App.2d 156, 551 Cal.Rptr. 215 (1966).

⁸ For example, the United States publicly acknowledged in 1933 that under California law California would own the bed as it became exposed. *Supra* at 3. This historic acceptance of California law governing federal upland ownership rights at Mono and Owens Lakes is alone dispositive on the choice of law issue. See *Kimbell Foods, Inc.*, 440 U.S. at 730-33 (federal law incorporates state law as rule of decision where SBA administratively relied on state substantive law).

The necessary effect of the Ninth Circuit's decision will be to require the development of federal common law rules in virtually every case involving state sovereign interests. Not a word in *California v. United States* suggested that the Court intended to essentially overrule its unanimous decision in *Wilson* rendered just four years previously. This Court's review is absolutely necessary to explain to the federal courts that *Wilson* remains the law in boundary disputes involving federal property along inland navigable waters.

II

IF FEDERAL COMMON LAW MUST GOVERN THIS CASE, THE COURT MUST DEVELOP RULES FOR DETERMINING WHETHER A RELICITION HAS IN FACT OCCURRED

Even if federal common law rules of property must now govern, the Court should grant this petition in order to determine the content of federal common law. There are no "settled" federal principles to resolve disputes about the ownership of uncovered lake bed, and general common law supports California's retention of the uncovered bed.

A. Common Law Courts Do Not Ordinarily Apply the Reliction Doctrine to Determine Ownership of Lake Beds Uncovered by Intentional Diversions or Drainage

The parties have had two primary disagreements about what should be the content of federal common law. First, the parties dispute whether the common law reliction doctrine should govern the ownership of the uncovered bed.⁹ The United States argued, and the Ninth Circuit found, that there exists a "well-settled" federal common law of reliction, and that this reliction doctrine

⁹ Accretion at common law is generally defined as the gradual and imperceptible addition of soil to the shoreline by the action of the water to which the land is contiguous. E.g., *Mather v. State*, 200 N.W.2d 498, 500 (Iowa 1972). Reliction is the uncovering of land by the gradual and imperceptible recession of water. *Flisrand v. Madison*, 152 N.W. 796, 798 (S.D. 1915).

always governs the ownership of uncovered lake bed regardless of the circumstances in which it became uncovered. California contended that there are no federal common law rules for determining whether the uncovering of a lake bed constitutes a reliction, and that, if federal common law must be created, it should follow the line of general common law authority, which does not apply the reliction doctrine where lake beds are uncovered by an intentional diversion or drainage of their waters, and instead applies a drainage rule in which the submerged bed owner retains the uncovered bed.

The Ninth Circuit's misconception that there exists a well-settled federal common law of reliction was based on its understanding that, under federal law, accretion or reliction belongs to the upland owner. See *California v. United States*, 457 U.S. at 284. Yet this ownership rule does not come into play, if at all, until the threshold question has first been resolved—does the process by which the lake has been uncovered even constitute a reliction? There is no federal common law authority, however, that provides standards or criteria for answering this threshold question.

The “well-settled” federal law addressing uncovered lake bed upon which the Ninth Circuit relied consisted of three cases, all involving accretion to certain subdivided lots on the western shore of Lake Michigan, *Banks v. Ogden*, 69 U.S. 57 (1865); *Johnston v. Jones*, 66 U.S. 209 (1862); *Jones v. Johnston*, 59 U.S. 150 (1856). These cases provided no guidance whatever for determining whether the reliction doctrine should be used to characterize the process that has occurred in the factual circumstances of this very different case. None required the Court to determine the nature of the process involved—all the parties agreed that the newly-added land was the product of accretion. *Jones*, 59 U.S. at 151-53. All the Court was required to decide were the rules for apportioning this identified accretion between competing upland owners. *Id.* at 152-53, 157. Consequently, the Court did not address—and had no reason to address—whether it is appropriate to employ the reliction doctrine where a lake has been uncovered by drainage or diversions. Nor did the Court identify or apply any standards for determining whether shoreline movement was grad-

ual and imperceptible within the meaning of the reliction doctrine. *Id.* at 155 ("I speak not now of sudden and considerable changes, which are governed by different principles"). And, even if the Court had established such rules, it could not be assumed that they would apply in the vastly different factual situation where there has been a substantial recession of a terminal lake resulting from a diversion of its tributaries.

If the Ninth Circuit wished to create federal common law, it should have looked to general common law authority, under which the owner of the bed retains ownership of lake bed that has been uncovered by intentional diversions or drainage. E.g., *Martin v. Busch*, 112 So. 274, 287 (Fla. 1927) ("The doctrine of reliction is applicable where from natural causes water recedes by imperceptible degrees; and does not apply where land is reclaimed by governmental agencies as by drainage operations"); *Padgett v. Central and South Florida Control Dist.*, 178 So.2d 900, 904 (Fla.App. 1965) ("Where, as here, the state causes or permits the level of a navigable lake to be lowered so as to make the water recede and thereby uncover lands below the original high-water mark, lands so uncovered continue to belong to the state"); see *Noyes v. Collins*, 61 N.W. 250 (Iowa 1894); *State v. Longyear Holding Co.*, 29 N.W.2d 657 (Minn. 1947); Tiffany, Law of Real Property (3d ed. 1939, ch. 28, § 1222 at 1083; cf. *Garrett v. State*, 289 A.2d 542 (N.J. 1972) (state retained ownership of dry creek bed exposed as result of upstream filling operations conducted by third party with state consent).) The United States Department of Interior itself has previously recognized this rule that a lake bed which has been intentionally uncovered through drainage or diversions continues to belong to the owner of the lake bed. *Rayford v. Winters*, A 28125 (January 15, 1960). The California law of uncovered lake beds is essentially a codification of this common law drainage rule. (*Supra* at 17 n. 7.)

In short, federal common law courts have never developed any standards or rules to determine whether the intentional uncovering of a lake bed by diversions is governed by the reliction doctrine or the drainage doctrine. The absence of federal common law is not surprising, because, until the Ninth Circuit's decision here, the development of real property rules has been the concern

of state law, at least where interstate boundaries are not involved. *Wilson*, 442 U.S. at 673. Therefore, should the Court determine that federal common law governs this case, it should follow the common law rule that specifically addresses the situation in which lake beds have been uncovered by intentional diversions or drainage, under which California retains the uncovered bed.

B. There Are No Federal Common Law Rules for Determining Whether a Recession Is "Gradual and Imperceptible"

Second, should the Court determine that this case must be governed by a federal common law of reliction and not a drainage doctrine, it should resolve the parties' dispute about the test for determining whether the uncovering of a lake has been "gradual and imperceptible" within the meaning of the reliction doctrine. The United States, relying on dicta in *County of St. Clair v. Livingston*, 90 U.S. (23 Wall.) 46, 50 (1874), has contended that the uncovering of a lake is gradual and imperceptible unless it can be perceived at an instant of its occurrence, and that only lake shoreline movement as rapid as that associated with a river avulsion can defeat application of the reliction doctrine. The courts below adopted this approach. App. C at A-12; App. A at A-43. California contends, relying on common law authorities, that the uncovering of a lake may be so "sudden" that it is not gradual and imperceptible within the meaning of the reliction doctrine, even though its uncovering may not be a visible, "avulsive" movement at any one instant of time. For this purpose, California offered evidence of substantial shoreline movement over "short term" periods of hours, days, and weeks, and argued that no common law court has ever found changes of this speed and magnitude to be gradual and imperceptible.¹⁰

¹⁰ California's evidence showed, for example, that there have been hours where the shoreline at a particular location migrated more than 2 feet; over 1400 days during which the shoreline at a particular location migrated ten feet or greater; and over 150 days during which the shoreline at a particular location migrated 40 feet or greater, including instances where the shoreline migrated more than 100 feet in a single day. Pl. Ex. 6. Likewise, there have been over 1500 weeks since 1940 during which the shoreline at a particular location migrated more than five feet; over 225 weeks during which at a particular location the

The Ninth Circuit's opinion demonstrates the scarcity of federal authority addressing the meaning and application of the "gradual and imperceptible" test when it fails to cite any federal authority which actually applies the test in a discrete factual context or provides any workable standards to determine whether lake shoreline movements are gradual and imperceptible. Yet common law authority—disregarded by the Ninth Circuit—directly supports California's approach.

In *Boorman v. Sunnuchs*, 42 Wis. 233 (1877), the trial court found that a lake's recession was gradual and imperceptible because "a person watching the process would not see it recede from the original bank." *Id.* at 245. Applying the "Lovingston test" the Wisconsin Supreme Court reversed:

It is very manifest that the water might have receded altogether too suddenly to have vested the title in the uncovered land in the plaintiff, and yet a person watching the pond be quite unable to see the waters recede. We take it that had the whole fall in the water occurred within a week, - perhaps within a day, at a uniform rate, the human eye is not sufficiently acute to have detected the process. Yet if a portion of the bed was laid bare by a process so sudden, no

shoreline migrated 125 feet or greater, including instances when the shoreline migrated 450 feet or more during a single week, *id.*; and there have been particular locations of the shoreline that have migrated 2400 to 4700 feet during a seven-month period. The United States criticized California for selecting profiles where shoreline movement was likely to be most prominent; California responded that it is appropriate to consider areas where changes are most noticeable because these areas confirm the existence of a dramatic recession that is occurring around the entire lake.

The United States' own presentation emphasized "average" rates of shoreline migration. See App. D at A-47. California criticized the use of averages as misleading. The land under and around Mono Lake is a mix of extremely flat and extremely steep slopes, ranging from slopes of less than 1 foot per 1000 feet to 800 feet per 1000 feet. Ct. Ex. 2-B at C-1 to C-7. Averaging rates of migration from steep and flat slopes therefore grossly distorts what an observer would be capable of actually seeing on the ground.

one will contend that the portion thus uncovered became thereby the property of the owner of the land adjoining." *Id.*

Other courts also have found that changes to water boundaries are not necessarily gradual and imperceptible even though the changes were not observable as they occur. See e.g., *St. Louis v. Rutz*, 138 U.S. 226, 251 (1891) (movement of mass of land for one mile over course of several years "not imperceptible, in a legal sense"); *Attorney General v. Reeve*, 1 Times L.R. 675 (1885) (movement of beach visible from month to month and day to day not gradual and imperceptible); *McCafferty v. Young*, 397 P.2d 96, 100 (Mont. 1964); *Puyallup Indian Tribe v. Port of Tacoma*, 717 F.2d 1251 (9th Cir. 1983).

The sole federal authority that has applied a test for determining whether the recession of a navigable lake was gradual and imperceptible supports California's position. That is the unpublished Special Master's Report relied on by this Court in *Utah v. United States*, 420 U.S. 304 (1972).¹¹ Despite extensive briefing, both courts below disregarded the Special Master's Report. Using an approach that directly supports California's view of the test, the Special Master concluded that the recession of the Great Salt Lake was not "imperceptible" within the meaning of the reliction doctrine. *Utah v. United States*, No. 31 Original, Special Master's Report. ("Report") at 10, 15 n. 15, 18 n. 20.

The Special Master's finding that the recession of the Great Salt Lake was not gradual and imperceptible is significant here in a number of critical respects. First, rejecting the identical argument made by the United States here, the Special Master found that the recession of the Great Salt Lake was not gradual and imperceptible even though he found there was no avulsion. Report at 10. This negates a central assumption of the Ninth Circuit that there must be an instantaneously visible and violent avulsion to defeat application of the reliction doctrine.

Second, the Special Master, relying on hourly, daily, and weekly changes, found that the recession of the Great Salt Lake

¹¹ The Special Master applied federal common law because *Bonelli* was good law at the time of his decision. Report at 5.

was not gradual and imperceptible even though there has been at "no particular moment a separate perceptible component." Report at 19. This further confirms that it is unnecessary to find that the recession of Mono Lake is visible at any particular instant of time in order to find that the overall process has not been gradual and imperceptible, and that it is proper to consider evidence of movement over short intervals.

Third, the Special Master rejected the use of averages endorsed by the Ninth Circuit in favor of an approach which emphasized the recession's actual effect on the shorelands. Report at 16-17.

Ignoring general common law authority, as well as the sole federal authority on point, the Ninth Circuit transferred California's title to the uncovered bed of Mono Lake by relying on dicta in cases that never applied the "gradual and imperceptible" test to a remotely similar set of facts. If the Court concludes that a federal common law of real property must now govern boundary disputes, it must adopt a test that, consistent with the broad range of common law authority, recognizes that the rapid uncovering of a lake may be gradual and imperceptible even though its movement is not visible at any one instant of time.

CONCLUSION

For these reasons, the Court should summarily vacate the judgment below, or issue the writ of certiorari to the Ninth Circuit.

Dated: April 21, 1987

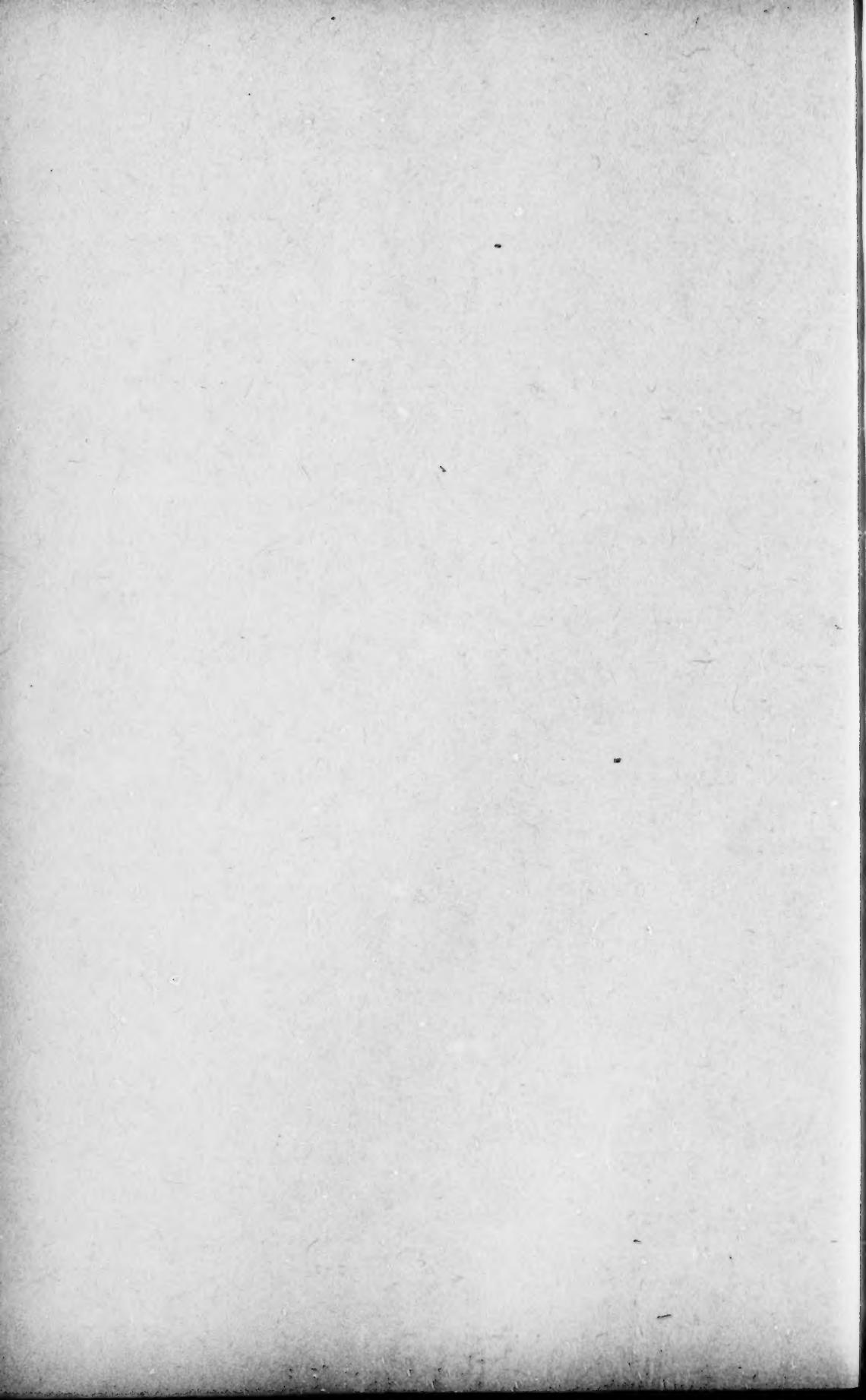
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(Appendices follow)



Appendix A

**For Publication
United States Court of Appeals
For the Ninth Circuit**

**No. 85-1965
D.C. NO. C-S-80-696-LKK**

**State of California, ex rel.
State Lands Commission,
Plaintiff/Appellant, v.**

**United States of America, Donald P. Hodel,*
Secretary of the Interior, et al.,
Defendants/Appellees.**

**Sierra Club, et al.,
Intervenors.**

**Appeal From the United States District Court for the
Eastern District of California,
Lawrence K. Karlton, United States District Judge, Presiding**

**Argued and Submitted April 14, 1986
San Francisco, California**

Before: Kennedy, Reinhardt, and Brunetti, Circuit Judges

Reinhardt, Circuit Judge:

The State of California appeals from a judgment awarding the United States title to land exposed by the recession of Mono Lake. California argues that the district court erred in 1) adopting federal rather than state law as the rule of decision to determine the ownership of the exposed lake bed; 2) applying the law of reliction to the recession of Mono Lake; 3) selecting the methodology to be used in determining whether the recession of the Lake has been "gradual and imperceptible" for purposes of the reliction doctrine; and 4) granting intervention to the Sierra Club and the

* Donald P. Hodel has been substituted for Cecil D. Andrus as defendant-appellee in this appeal pursuant to Federal Rule of Appellate Procedure 43(c)(1).

Natural Resources Defense Council. We affirm all of the district court's challenged rulings and uphold its judgment in favor of the United States.

I FACTS

Mono Lake is a navigable lake that lies at the bottom of the Mono Basin immediately east of the Sierra Nevada in eastern California. All drainage in the Mono Basin flows toward the Lake; no outlet streams exist.

The United States owns approximately seventy percent of the uplands surrounding Mono Lake. The federal lands were withdrawn from the public domain in the early 1930's in order to protect the watershed and to preserve the land for grazing, recreation, and other uses. Private parties own the remaining thirty percent of the Mono uplands. The State of California owns the bed of Mono Lake, which, as land underlying navigable water within its boundaries, it acquired upon admission to the Union. *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 370 (1977).

In 1940, the City of Los Angeles, pursuant to permits issued by the State, began diverting water from Mono Lake's four main feeder streams to help supply the City's water needs. At that time, the Lake occupied an elevation of 6,417 feet above sea level. Increased diversions since 1974 have essentially halted the inflow to the Lake from the feeder streams. The lake waters have receded to an elevation of 6,380 feet above sea level; approximately 12,000 acres of lake bed have been uncovered as a consequence of the recession. The exposed lake bed contains valuable mineral and geothermal resources. The parties agree that the waters of Mono Lake will continue to recede as a result of the City's diversions.

II PROCEDURAL HISTORY

California filed a quiet title action against the United States in 1980 to claim title to the exposed lake bed. The Sierra Club and

the Natural Resources Defense Council intervened on behalf of the United States. The parties filed cross-motions for summary judgment on the choice of law issue. California urged that state law, which it contended would vest title to the exposed lake bed in the State, should supply the rule of decision. The United States argued that the federal common law of reliction should apply. Under the federal rule, when a body of water serving as the boundary between two parcels of property gradually and imperceptibly recedes, the exposed land belongs to the upland owner. The doctrine of reliction contrasts with the avulsion doctrine, which provides that when a body of water serving as the boundary between two parcels of property violently shifts its course, the property boundary does not shift with the water, but remains in its former location. If the exposed lake bed constitutes relicted land, under federal common law the United States, as upland owner, would own the exposed bed as well.

The district court held that federal law governs the case and that the federal common law of reliction should supply the rule of decision. The case went to trial on the issue whether the disputed lands were formed by the process of reliction. The outcome turned on whether the recession of the Lake had been gradual and imperceptible. California and the United States disagreed over the proper methodology for determining whether a change in a water boundary has been "gradual and imperceptible." After a bench trial, the court adopted the methodology urged by the United States and ruled that the recession of Mono Lake had been gradual and imperceptible. The court awarded the United States the exposed lake bed under the law of reliction.

We review *de novo* the district court's decision to apply the federal rule of reliction to the recession of Mono Lake. *United States v. McConney*, 728 F.2d 1195 (9th Cir.) (en banc), *cert. denied*, 105 S. Ct. 101 (1984). We also review *de novo* the district court's choice of methodology to be used in determining whether the recession of the Lake has been gradual and imperceptible. *Id.* We review the findings made as a result of applying that methodology under the clearly erroneous standard. *Id.* A grant of permissive intervention is reviewed for an abuse of discretion. *Smith v. Pangilinan*, 651 F.2d 1320, 1325 (9th Cir. 1981).

III

ANALYSIS

A. Choice of Law

Federal law governs disputes over claims that there has been a reliction or accretion to federal land. See *California ex rel. State Lands Commission v. United States*, 457 U.S. 273, 283 (1982) (*State Lands Commission*).¹ California does not dispute that federal law governs the present case since the United States owns the uplands to Mono Lake and claims title to the exposed lake bed. Controversies governed by federal law, however, do not necessarily require the application of a uniform federal rule of decision. In some categories of cases, courts must balance the federal and state interests in the application of their own rules to the issue at hand, and, where the balance favors doing so, borrow state law as the rule of decision. *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 671-72 (1979). California argues that the present case is a proper one for the application of the *Wilson* balancing test, and that under that test state law should supply the rule of decision.

California's assumption that we may adopt state law as the rule of decision in this case under the *Wilson* balancing test is erroneous in light of the Supreme Court's decision in *State Lands Commission*. *State Lands Commission* involved a dispute between California and the United States over accretions to federally-owned ocean front land. California owned the submerged

¹ Although *State Lands Commission* involved accretions to federal land, whereas this case involves an alleged reliction, neither party suggests that the difference has any relevance to the choice of law determination. An "accretion" occurs where bits of rock, sand, and dirt accumulate on a shore and push the water line back, thereby creating new land. A "reliction" occurs where land is exposed by the imperceptible recession of water. The "terms are often used interchangeably, and law relating to accretions applies in all its features to relictions." 3 *American Law of Property* § 15.26 at 855 (A.J. Casner ed. 1952) (cited in *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 387 n.7 (1977) (Marshall, J., dissenting on other grounds)).

tidelands by virtue of its sovereign status. California alleged that under state law, it was entitled to the accretions because of its ownership of the submerged tidelands. The United States alleged that under federal law, it was entitled to the accretions because of its ownership of the uplands abutting the submerged tidelands. The Supreme Court held that because Congress has addressed the issue of accretions to federal lands abutting state-owned submerged lands in section 5(a) of the Submerged Lands Act, 43 U.S.C. § 1313(a) (1982), that section precludes borrowing for federal law purposes a state rule that would "divest" the United States of ownership of accreted lands. 457 U.S. at 283-84. Section 3 of the Act confirms and vests in the states "title to and ownership of the lands beneath navigable waters within [their] boundaries." 43 U.S.C. § 1311(a); section 5(a) of the Act withholds from the operation of section 3 all "accretions" to lands acquired or reserved by the United States.² In light of section 5(a), the Court "appl[ied] the federal rule that accretions, regardless of cause, accrue to the upland owner," and ruled that the United States held title to the disputed land. 457 U.S. at 285.

Because in the present case the United States' claim is based in part on section 5(a) of the Submerged Lands Act,³ we follow *State Lands Commission* and apply a federal rule of decision; we do so without balancing, under *Wilson*, the varying federal and state interests in the application of their respective law. California claims the exposed lake bed by virtue of its sovereign ownership

² In relevant part, section 5(a) excepts "all tracts or parcels of land together with all accretions thereto . . . title to which has been lawfully and expressly acquired by the United States . . . , and all lands . . . expressly retained by or ceded to the United States when the State entered the Union." 43 U.S.C. § 1313(a). Although the statute expressly mentions "accretions" only in connection with federal acquired lands, accretions to retained lands are similarly excepted from the operation of section 3. *State Lands Commission*, 457 U.S. at 283 n.11.

³ The Submerged Lands Act applies to lands beneath inland lakes as well as coastal waters. See 43 U.S.C. § 1301(a) ("[t]he term 'lands beneath navigable waters' means (1) all lands within the boundaries of each of the respective States which are covered by nontidal [navigable] waters . . . as . . . modified by accretion, erosion, and reliction.").

of the submerged lake bed. The United States claims the lands by virtue of its status as a littoral owner. As we have noted, relictions are treated in the same manner as accretions, *see supra* note 1; section 5(a)'s reservation of accretions therefore encompasses relictions. Thus, section 5(a) reserves from California's ownership of the Mono lake bed all relictions to the federal uplands. In light of section 5(a), *State Lands Commission* precludes us from borrowing a state rule that would "divest" the United States of ownership of the relicted land and award it to the state.

That California disputes the United States' contention that the recession at Mono Lake constitutes a reliction does not affect the choice of law determination under *State Lands Commission*. Although the Court there noted that both parties agreed that the disputed land constituted an accretion, 457 U.S. at 287, the Court did not suggest that had the parties disagreed over the proper characterization of the change in the land, state law could have been adopted as the standard for determining the question. The Court's rationale for the application of a federal ownership rule—that section 5(a) forecloses "borrowing for federal-law purposes a state rule that would divest federal ownership" of land that is the subject of that section, 457 U.S. at 284—mandates the application of federal principles of law in characterizing the disputed land changes in this case. A state's definition of accretions and relictions may be no less hostile to federal interests than its ownership rules.

California argues against the application of *State Lands Commission* to the present case on several grounds, all of which we reject. First, California argues that section 5(a) does not affect the choice of law determination in disputes involving inland waterways. It contends that because the Act merely *confirms* the states' title to submerged lands beneath their inland waterways, whereas it *vests* title in the states to submerged coastal lands, it has no "substantive legal effect" with regard to inland waterways. This analysis is erroneous. Section 5(a) excepts from the operation of section 3 federal lands and all accretions thereto. That "substantive legal effect" is independent of the distinction in section 3 between a grant and a confirmation of the states' title. Congress' authority to except accretions from its confirmation of

title to submerged inlands is no different from its authority to except accretions from its grant of title to submerged coastal lands. Section 5(a) therefore has the same choice of law consequence in an inland waters dispute as in a coastal waters dispute.

California attempts to support its claim that section 5(a) of the Submerged Lands Act has "no substantive legal effect" with regard to inland waters, and hence that *State Lands Commission* does not govern the present case, by pointing to the fact that the Supreme Court in *Wilson v. Omaha Indian Tribe*, 442 U.S. 653 (1979), adopted a state rule of decision in an inland waters property dispute without mentioning the Submerged Lands Act. California infers from that fact that the Court shares its view of the Act as irrelevant to inland waters disputes. In further support of this claim, California notes that in this circuit we have followed *Wilson* by adopting a state rule of decision in three cases involving inland waters disputes without making any reference to the Act. See *Puyallup Indian Tribe v. Port of Tacoma*, 717 F.2d 1251 (9th Cir. 1983), cert. denied, 104 S. Ct. 1324 (1984); *United States v. Aranson*, 696 F.2d 654 (9th Cir.), cert. denied, 104 S. Ct. 423 (1983); *United States v. Harvey*, 661 F.2d 767 (9th Cir. 1981), cert. denied, 103 S. Ct. 74 (1982).

California's argument fails. Section 5(a) of the Act had no application to the factual situation in *Wilson*. In *Wilson*, land from an Indian reservation on the west bank of the Missouri River was eroded by the River and deposited on the east bank, which was owned by a number of parties including Iowa. The Tribe and the east bank landowners each claimed the land. The Tribe claimed that the land deposited on the east bank remained part of the reservation under the doctrine of avulsion.⁴ The east bank landowners claimed the land as an accretion to their riparian property. The parties disputed whether federal or state law should be used to decide whether the land in dispute had formed by the process of avulsion or accretion. The Court held that there is no need for a uniform federal rule to govern disputes between the United States and other riparian owners. As long as states apply their rules governing riparian ownership even-handedly, the

⁴ For a definition of avulsion, see *supra* at p. 4.

United States stands to gain land from, as often as it would lose land to, the opposing riparian owner. *Wilson*, 442 U.S. at 673. Moreover, were federal law to govern disputes between the United States and other riparian owners, those other owners' rights would be subject simultaneously to different laws, depending fortuitously upon whether the non-federal owner asserted its rights against a federal or against a non-federal party. *Id.* at 647.

Since *Wilson* involved a dispute between riparian owners, the case did not implicate section 5(a) of the Submerged Lands Act. Although Iowa was a party to the dispute, it did not rely on its sovereign status as owner of its submerged lands in claiming the land but rather on its riparian rights. It stood in no different position than the other east bank owners.

Section 5(a) comes into play only in disputes between the United States and a state claiming land by virtue of its sovereign ownership of submerged lands. The section excepts accretions to federal land from the grant or confirmation of *submerged lands* to the states; that exception does not affect disputes concerning the rights of other riparian or littoral owners.

Moreover, although we do not apply the *Wilson* balancing test here, the various factors that comprise that test suggest why federal law must govern disputes between the United States as a riparian or littoral owner and the state as a submerged lands owner. First, the state and the United States will always occupy the same relative positions in such disputes. The state, therefore, could adopt property rules that would always award disputed land to the submerged lands owner and thus that would always be injurious to the interest of the United States. Second, application of a federal rule to submerged lands disputes between a state and the United States will not have an arbitrary impact on any private property rights or interest, since they will continue to be governed in each instance by state law.

None of the three Ninth Circuit cases cited by California implicated the Submerged Lands Act, since none involved disputes between the United States as a riparian or littoral owner and a state as a submerged lands owner. See *Puyallup Indian Tribe v. Port of Tacoma*, 717 F.2d 1251 (9th Cir. 1983), cert. denied, 104

S. Ct. 1324 (1984); *United States v. Aranson*, 696 F.2d 654 (9th Cir.), cert. denied, 104 S. Ct. 423 (1983); *United States v. Harvey*, 661 F.2d 767 (9th Cir. 1981), cert. denied, 103 S. Ct. 74 (1982).

Second, California argues that *State Lands Commission* does not apply because, as the Court stated, it was "not a case in which federal common law must be *created*," 457 U.S. at 284 (emphasis in original), whereas, according to California, the present case necessitates the creation of new law. California claims that what it terms "the intentional uncovering" of a lake presents a novel circumstance within federal law. It argues, on that basis, that federal law must be created in order to determine whether the recession at Mono Lake constitutes a reliction.

We reject California's argument. First, the Supreme Court in *State Lands Commission* did not suggest that section 5(a) mandates the adoption of a federal rule of decision *only* where federal law is well-settled. Second, the law of reliction is well-settled, see *State Lands Commission*, 457 U.S. at 284, and it encompasses the recession that occurred at Mono Lake. Federal law defines a reliction as previously submerged land which becomes exposed by the gradual recession of water. See, e.g., *United States v. Ruby*, 588 F.2d 697, 701 n.4 (9th Cir. 1978), cert. denied, 442 U.S. 917 (1979); *Bear v. United States*, 611 F. Supp. 589, 593 n.2 (D. Neb. 1985). The federal law makes no exception for relictions or accretions resulting from artificial causes. See, e.g., *State Lands Commission*, 457 U.S. at 285; *County of St. Clair v. Lovingston*, 90 U.S. 46, 66 (1874); *United States v. Claridge*, 416 F.2d 933, 935 (9th Cir. 1969), cert. denied, 397 U.S. 961 (1970). The Supreme Court has applied the accretion doctrine to additions to lake uplands resulting from artificial causes. See *Jones v. Johnston*, 59 U.S. 150, 152 (1856) (accretions to shore of Lake Michigan resulting from construction of harbors and piers); see also *Banks v. Ogden*, 69 U.S. 57 (1865). California attempts to distinguish *Jones* and *Banks* by characterizing the recession as an "intentional uncovering." It then seeks to bring this case under state case law awarding to the state lands that are deliberately exposed by a reclamation project. This attempt fails. That the recession may have been a "necessary effect" of the City's

diversion of the Lake's feeder streams does not mean that the land was intentionally uncovered. Moreover, California does not challenge the district court's finding that the diversions at the Mono Basin do not constitute a drainage or reclamation project. It is clear, in fact, that when the State authorized the City to divert the water from the feeder streams neither the City nor the State was motivated by a desire to reclaim any lands underlying Mono Lake.

Finally, even were California correct that this case necessitates the "creation" of law, we would not on that basis find the case inappropriate for decision under a federal rule. California's argument is anomalous; it overlooks the fact that the cases which now constitute established law themselves necessarily "created" law when they were first decided.

We conclude that under *State Lands Commission* the district court properly adopted the federal reliction doctrine as the rule of decision in the present case. Moreover, even were we to analyze the choice of law question under the *Wilson* balancing test, we would reach the same result. For the reasons discussed *supra* at 11, the *Wilson* factors would mandate adoption of a federal rule of decision in case in which a state claims lands by virtue of its status as the submerged lands owner and the United States claims those same lands as the littoral or riparian owner.

B. Application of the Reliction Doctrine

When a body of water defines the boundaries of private property, problems of boundary definition will arise when the water body shifts its course or changes in volume. The doctrines of accretion and reliction on the one hand and avulsion on the other provide a framework for resolving boundary disputes arising from the dynamic nature of water. When a water line that constitutes a property boundary changes gradually and imperceptibly by the gradual deposit of solid material on its shore (accretion) or by gradual recession (reliction), the property boundary changes with it. See *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313, 325-26 (1973), overruled on other grounds, *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977). In such a situation, title is "ambulatory." However, where a water

line changes violently and visibly, i.e., by avulsion, the property boundary does not change with the water but remains where it was prior to the change. See *Philadelphia Co. v. Stimson*, 223 U.S. 605, 624 (1911).

California claims that the district court misapplied the test for determining whether a reliction is "gradual and imperceptible." In its conclusions of law, the court quoted the federal common law rule of perceptibility (the "*Lovingston* test"):

It is not enough that the change may be discerned by comparison at two distinct points of time. It must be perceptible when it takes place. "The test as to what is gradual and imperceptible in the sense of the rule is, that though the witnesses may see from time to time that progress has been made, they could not perceive it while the process was going on."

Stimson, 223 U.S. at 624 (quoting *County of St. Clair v. Lovingston*, 90 U.S. 46, 68 (1894)). The district court found as a fact that the average person would not have observed the movement of the shoreline as it was occurring.

California does not challenge the court's finding that an average person would not have observed the shoreline migrations as they were occurring.⁵ Rather, it attempts to replace the perceptibility test with a measurability test. Since the shoreline migrations were *measurable* over relatively short periods of time, California argues that they were not "gradual and imperceptible." At trial, California presented computer-generated data of shoreline migrations occurring over periods of weeks, days or hours. It computed those migrations at selected areas of the Lake with the gentlest shoreline slopes. In such areas, a small change in lake elevation will produce a greater change in shoreline position than where the shore slope is steep. California gathered its data during periods of greatest daily and annual evaporation. It admits that daily shoreline migration correlates with variations in evaporation.

⁵ California's own expert testified that he never actually perceived the shoreline migrations while at the Lake and that an average observer would not be able to do so.

We need not determine here whether the *Lovingston* perceptibility test should be literally applied, though such an application may well be the proper one. Here, the methodology adopted by the district court for determining whether the shoreline change was gradual and imperceptible was in fact consistent with utilization of a measurability standard, the standard suggested by California, and constituted as favorable an application of *Lovingston* as the state could possibly have been entitled to.

The district court took into account measurable changes in the Mono shoreline. It reached its conclusion that the recession was "gradual and imperceptible," however, by averaging measurable shoreline change over the entire lake shore and by discounting those changes attributable to daily evaporation and seasonal fluctuations. The district court calculated average shoreline migration on the basis of ninety percent of the daily declines since 1940 and on a set of twenty-six profiles of the shore slope from around the Lake. The average shoreline migration since 1940 has been .30 feet per day on the steeper western side of the Lake and .32 feet per day on the gentler eastern side. As these migration figures show, shoreline migration over the Lake as a whole has clearly not been sudden and perceptible. More important, California's gradual loss of its property in the lake bed as a whole over the last several decades is in no way comparable to a riparian owner's sudden loss of property when a river violently changes course.

California's real complaint is with the court's use of averages for determining whether the shoreline change was gradual and imperceptible, although California does not challenge that methodology explicitly. We find the court's methodology to constitute a sensible interpretation for the *Lovingston* perceptibility test, especially in the context of a lake. We affirm the district court's use of that methodology in determining whether the Mono Lake recession was gradual and imperceptible.

D. Grant of Intervention

The district court did not specify whether it granted intervention to the Sierra Club and the Natural Resources Defense Council as of right under Fed. R. Civ. P. 24(a) or permissively

under Fed. R. Civ. P. 24(b). California challenges the grant under the abuse of discretion standard appropriate to permissive intervention under Rule 24(b). We treat the grant as permissive and review it under an abuse of discretion standard.

We hold that the court did not abuse its discretion in granting intervention to the Sierra Club and the Natural Resources Defense Council. The intervenors' defense to California's suit presented questions of law and fact in common with the main action. Moreover, California does not allege that it has been unduly prejudiced by the intervention.⁶ Thus, the grant was proper.

IV CONCLUSION

We affirm under *State Lands Commission* the district court's choice of a federal rule of decision in the present dispute. We affirm the court's application and construction of the federal law of reliction to the recession at Mono Lake, and thus affirm the judgment granting the United States title to the exposed lake bed. We affirm the grant of intervention. AFFIRMED

⁶ We need not consider whether or under what circumstances an erroneous grant of intervention could constitute reversible error under Fed. R. Civ. P. 61.

Appendix B

United States District Court
Eastern District of California

No. Civil S-80-696 LKK

State of California, ex rel.
State Lands Commission,
Plaintiff,

v.

United States of America, et al.,
Defendants.

ORDER

[Filed Sept. 1, 1983]

This case is one of a triad presently pending before this court concerning the future of Mono Lake and, by virtue of its tributaries being a major source of water for the County of Los Angeles, the future of that great metropolitan area. Mono Lake's unique ecological values and its importance as a source of water for the County of Los Angeles have given rise to a vast literature (*see National Audubon Society v. Superior Court*, 33 Cal. 3d 419, 424 n.2 (1983)), and has recently been discussed at length by the California Supreme Court. *Id.* No useful purpose would be served by restating here the many observations of either Mono Lake's importance as a unique ecological resource or its importance as a water resource.

This suit was brought by the State of California to quiet title to lands surrounding the lake which have been exposed by virtue of the recession of its waters.¹ The parties have filed cross motions

¹ The State of California, at a Status Conference, inquired of the United States as to whether it would stipulate that the lands in issue were "relitected" lands. The term "reliction" refers to the gradual and imperceptible uncovering of land by the lowering of water rather than sudden or seasonal exposure of the land. *See United States v. Ruby Co.*, 588 F.2d 697, 701 (9th Cir. 1978); 93 C.J.S. Waters § 78, and see Section III, *infra*. The United States ultimately offered to stipulate, but the State then declined to do so. California now takes the position that

for partial summary judgment concerning the appropriate choice of law and thereby seek to determine what law applies to resolution of this case. The State of California argued initially that California law applied while the United States of America, supported by intervenor Sierra Club, argued that federal common law applied. Subsequent to the decision of the United States Supreme Court in *State of California, ex rel. State Lands Commission v. United States*, ____ U.S. ___, 102 Sup. Ct. 2432 (1982), the State conceded that the applicable choice of law was federal but argued that the court should adopt California law as the federal rule of decision.

I FACTS²

Mono Lake is the second largest lake in California. It sits at the base of the Sierra Nevada escarpment near the eastern entrance to Yosemite National Park. *National Audubon Society v. Super-*

there is insufficient evidence concerning "the speed or perceptibility of the recession of Mono Lake's waters." California Memorandum of Points & Authorities, November 3, 1981 at 5. Because there is an insufficient predicate to determine whether the lands are "relicited" (see Section III, *infra*), the court will refer to them as "exposed" lands. Nonetheless, both sides have argued the instant motion as if the issue involved "relicited lands."

² In general the facts stated herein are drawn from a stipulated statement of facts, agreed upon by the parties, or the contents of the "Report of Interagency Task Force on Mono Lake" (Dec. 1979), hereinafter "Task Force Report;" both parties have requested the court to take judicial notice of this document pursuant to Fed. R. Evid. § 201(d). See *Latta v. Western Inv. Co.*, 173 F.2d 99, 103 (9th Cir. 1949), cert. denied, 337 U.S. 940. The Interagency Task Force on Mono Lake was created to investigate and determine what course of action was proper to protect the natural resources of the Mono Basin. The Task Force was composed of representatives of various federal agencies having management responsibilities (including the United States Bureau of Land Management, the United States Fish and Wildlife Service, and the United States Forest Service), and representatives of both the City of Los Angeles and the State of California. Task Force pp. 1-6. The City of Los Angeles apparently refused to "sign off" on the final report.

rior Court, 33 Cal. 3d at 424. It was at the time of California's admission into the Union and is now a navigable body of water although it has no outlet. Task Force Report p. 15. Other than precipitation, the sole source of water inflow into Mono Lake is drainage from the western side of the Mono Basin which funnels spring and summer run-off into the lake through four major streams: Lee Vining, Walker, Parker, and Rush Creeks. Task Force Report p. 11-12. Total inflow into the lake, including rainfall, is an average of 168,000 acre feet per year. Task Force Report p. 11. In the middle of the lake is Negit Island which historically has been used by the California Gull and other species of birds as a rookery. The rookery is a nesting area for approximately 25% of the world's population of the California Gull and a feeding area for both the largest known population of Eared Grebes and one-third of the world's population of Wilsons Phalaropes. Task Force Report at 15-20.

The Department of Water and Power of the City of Los Angeles (hereafter "DWP") received permits in the 1930's for the diversion of water from the four creeks. Pursuant thereto they constructed the Mono Basin Project. In 1941 DWP received a license from the State Water Resources Control Board to commence the diversion of 100,000 acre feet from the creeks. Task Force Report at 6, 12, 13. Since 1941, and consistent with the diversion noted above, the level of the lake began to decline. *Id.* at 15. DWP obtained a further license for increased diversions in 1974 to a maximum diversion of 167,000 acre feet per year from the Mono Basin. *Id.* at 13. In essence, the water exports pursuant to the licenses obtained by DWP have reduced the releases into Mono Lake to essentially zero, *id.*, and the level of the lake has been declining at a rate of one to two feet per year. *Id.* at 15. As a result of these diversions, the parties stipulate that the waters of Mono Lake will continue to recede.

Almost all of the land in the Mono Basin is under federal ownership and is administered by the Bureau of Land Management. Task Force Report at 11 (see n.4). Public lands in the Mono Basin were withdrawn from patent through Presidential Executive Orders in 1929 and in 1930. In 1931 Congress adopted Public Law 864. This act withdrew approximately 200,000 acres

of public lands including those riparian to the feeder streams of Mono Lake, those littoral to Mono Lake and those located on Negit Island, from the public domain. This was done for the purpose of protecting the watershed supplying the water to the City of Los Angeles and other communities and for grazing, recreation, and other uses.³

As the level of the lake receded pursuant to DWP's diversions, lands between the elevation level of the lake in 1941 at 6,417, and its present elevation level became exposed. In early 1979, due to the recession of the lake, and the alleged sequel of environmental damages, inquiries were made by the Sierra Club of the Secretary of Interior as to what the department would do pursuant to the Federal Land Policy Management Act to protect the federal resources in the Basin. As the department explored the problem posed by the Sierra Club it became clear that a dispute existed between the State of California and the Department of Interior as to the ownership of the exposed lands.⁴ That dispute led to the instant litigation. As the State succinctly put it, "the question to be answered in this case is whether California, the owner of the lake bed, or the United States, the owner of the once littoral upland public domain, is the owner of the exposed lands."⁵

³ The exact effect of this withdrawal is the subject of another lawsuit in the triad. See *Sierra Club, et. v. United States, et al.*, Civil No. S-80-282 LKK.

⁴ By the Treaty of Guadalupe Hildago (9 Stat. 922) the United States obtained, inter alia, all title to the ceded territory subject only to the provisions of the treaty. *Borax Consolidated v. Los Angeles*, 296 U.S. 10, 15 (1935); *Palmer v. Low*, 98 U.S. 63 (1878); *F.A. Hihn Co. v. City of Santa Cruz*, 170 Cal. 436 (1915). By virtue of the act of admission of California to the Union (9 Stat. 452) and the equal footing doctrine (see n.5), California acquired title to the beds underlying its waters. This title was confirmed to the State by the Submerged Lands Act, 43 U.S.C. § 1301 et seq.

⁵ The parties do not dispute that by virtue of California's sovereignty and the doctrine of equal footing, the State acquired title to the ordinary high water mark of the beds of all navigable waterways upon its entrance into the Union. *Martin v. Waddell*, 16 Pet. 367, 410 (1842); *Pollard's Lessee v. Hagan*, 3 How. 212, 229-301 (1845). Nor do the parties

II

CHOICE OF LAW AND RULE OF DECISION

Prior to the decision of the United States Supreme Court in *California ex rel. State Lands Commission v. United States*, ____ U.S. ___, 102 S.Ct. 2432 (1982), a vigorous and realistic dispute existed between the parties as to whether or not California or federal law governed resolution of this case. California, however, has conceded that under that case "the fact that the United States has never yielded title or terminated its interest in lands adjoining navigable waters is sufficient to require the application of federal law."⁶ Moreover the State, although it previously argued otherwise, now concedes that "there does exist a federal common law of accretion and avulsion, at least as to ocean front lands." Nonetheless, California "vehemently disagrees that the application of federal law to this land title dispute requires resort to federal rules of decision." It argues that the rationale of *California ex rel. State Lands Commission v. United States* as it relates to the selection of a rule of decision does not apply. Rather, the State asserts, that "*Wilson [v. Omaha Indian Tribe*, 442 U.S. 653 (1979)] continues to require the application of state law in determining the ownership of the [exposed] lands in inland waters."⁷

dispute that subsequently the United States acquired a fee to the ordinary low water mark.

⁶ Where "federal interests [are] at stake, . . . the choice of applicable law presents a federal question." *North Dakota v. United States*, ____ U.S. ___, 103 S.Ct. 1095, 1105 (1983). Because this is a case resolving title to federal lands, that federal interest requires application of federal choice of law rules. *California ex rel. State Lands Commission v. United States*, ____ U.S. ___, 102 S.Ct at 2438. Although federal choice of law principles apply, as I note in the text, this does not necessarily resolve the issue of choosing the appropriate rule of decision; moreover, the Rules of Decisions Act, 28 U.S.C. § 1652, has no direct dispositive application to the instant issue. See *DelCostello v. International Brotherhood of Teamsters*, ____ U.S. ___, 76 L.Ed.2d 476, 485 n.13 (1983).

⁷ The issue of whether California law should be used as the rule of decision in this case is critical. Here, as in *California ex rel. State Lands*

California's concession that federal law governs is wholly appropriate. Both the teaching of *California ex rel. State Lands Commission v. United States*, and *Wilson*, make it clear that federal law rather than state law governs disposition of issues concerning title to land with respect to which the United States "has never yielded title or terminated its interest." *Wilson v. Omaha*, 442 U.S. at 670, quoted in *California ex rel. State Lands Commission v. United States*, ____ U.S. ___, 102 S.Ct. at 2438.

California argues, however, that even if the issue must be resolved by resort to federal law, state law may nevertheless provide the source of that federal law. As the Supreme Court observed "[c]ontroversies governed by federal law do not inevitably require resort to uniform federal rules. [citation omitted] It may be determined as a matter of choice of law that, although federal law should govern a given question, state law should be borrowed and applied as the federal rule for deciding a substantive legal issue at hand. [citations omitted]" *California ex rel. State Lands Commission v. United States*, ____ U.S. ___, 102 S.Ct. at 2438. California argues that the Supreme Court's decision in *California ex rel. State Lands Commission v. United States*, requiring the application of "federal common law" as the source of the rule of decision does not apply here for two reasons. First, it argues that the instant case deals with inland waters whereas *California ex rel. State Lands Commission v. United States* concerned tidelands. Second, it notes that the Supreme Court in that case rested its decision on the Submerged Lands Act which, it argues, has no application to the instant case. Concluding that the rationale for the application of federal common law in *California ex rel. State Lands Commission v. United States* has no application to the instant case, the State then argues that a

Commission v. United States, the state asserts that its rule relating to "artificial accretion," see *California ex rel. State Lands Commission v. United States*, ____ U.S. ___, 102 S.Ct. at 2435, requires an ultimate determination in its favor. The United States on the other hand argues that under federal law relicted land belongs to the littoral owner and thus the United States must ultimately prevail. See Section III, *infra*.

three pronged test for determining applicability of federal or state law as the Federal Rule of Decision should apply.⁸

A. The Submerged Lands Act

The Supreme Court in *California ex rel. State Lands Commission v. United States* held that “dispositive” of the issue of whether federal law supplied the rule of decision in that case was the fact that “Congress has addressed the issue of accretions to federal land.” *California ex rel. State Lands Commission v. United States*, ____ U.S. ___, 102 S.Ct. at 2438. The Court explained that “the Submerged Lands Act, 43 U.S.C. § 1301, et seq., vested title in the States to the lands underlying the territorial sea . . . The Act also confirmed the title of the states to the tidelands up to the line of mean high tide. Section 5 of the Act, however, withheld, from the grant to the states all ‘accretions’ to coastal lands acquired or reserved by the United States. 43 U.S.C. § 1313(a). In light of this provision, borrowing for federal law purposes a state rule that would divest federal ownership is foreclosed.” *Id.* ____ U.S. ___, 102 S.Ct. 2438-39. The state argues that these passages demonstrate that *California ex rel. State Lands Commission v. United States* is inapplicable to the matter at bar. First, it argues that “[t]he Submerged Lands Act was not intended to create substantive property rights in lands lying under inland waters. It only confirmed ownership to these lands which everyone knew that the individual states already owned.”⁹ This aspect of the State’s argument is really composed

⁸ The State describes the three pronged test as (1) whether there is a need for a national uniform body of law to apply in comparable situations; (2) whether application of state law would frustrate federal policy or functions; and (3) the impact a federal rule might have on existing relationships under State law. Memorandum of Points and Authorities in Further Support of Plaintiff’s Motion for Summary Judgment, p.14. It cites in support of this three pronged test *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 672-73 (1979).

⁹ The State points to the legislative history of the Act to demonstrate that both congressional supporters and detractors of the Act agree that the confirmation of these lands was merely a reaffirmation of existing law. It cites in this regard H.R.Rep. No. 1778 80th Cong. 2nd Sess.

of two separate strands—one, that Congress did not intend to reach questions of inland waters, and two, that because California acquired title to the beds of inland waters upon its admission to the Union, the Submerged Lands Act could not affect that title in any event. Next, making much of the fact that the Supreme Court limited its observations concerning section 5 to “coastal lands” in *California ex rel. State Lands Commission v. United States* the State argues that the case has no application to inland waters.

I first turn to the question of statutory interpretation. “As with any case involving statutory interpretation, ‘we state once again the obvious when we note that, in determining the scope of a statute, one is to look first at its language.’ [citations omitted] ‘Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.’” *North Dakota v. United States*, ____ U.S. ___, 103 S.Ct. 1095, 1102-03 (1983).¹⁰

(1948), reprinted in 1953 U.S. Code Cong. & Ad. News 1425; S.R. Rep. N.133, 83 Cong. 1st Sess. (1953) reprinted in 1953 U.S. Code Cong. & Ad. News 1474; Minority views to accompany H.R. 5992, reprinted in 1953 U.S. Code Cong. & Ad. News 1439; Minority views to S.J. 13, reprinted in 1953 U.S. Code Cong. & Ad. News 1543, 1553.

¹⁰ The varying expressions of the United States Supreme Court as to the force, effect, and nature of the “plain meaning rule” are extremely perplexing. These variances have in turn caused this court to express itself about the plain meaning rule in a variety of cases in a variety of ways which the court says, frankly, to its embarrassment, are sometimes contradictory. See and compare, e.g., *United States v. Salsedo*, 477 F.Supp. 1235, 1240 (E.D.Cal. 1979) (“The words are plain and unambiguous—thus no construction is required or indeed permitted.”) with *Consortium of Community Based Organizations v. Donovan*, 530 F.Supp. 520, 527 (E.D.Cal. 1982) (“Nonetheless, recent Supreme Court and Ninth Circuit cases make it clear that the ‘plain meaning’ rule is no longer absolute but rather a flexible principle for ascertaining Congressional intent.”); compare both with *United States v. Veon*, 538 F.Supp. 237, 243 (E.D.Cal. 1982) (“As with any issue of statutory construction, consideration ‘begins, as indeed it must, with the text and legislative history’ [citations omitted].” In text I apply the expression of the rule found in *North Dakota v. United States*, a 1983 case, which has

In accordance with *North Dakota's* admonition, I turn to the statutory language to determine whether the Submerged Lands Act by its terms recognizes a distinction between coastal tidelands and lands littoral to inland waters. The plain words of the statute simply do not support the State's position. Nowhere in section 1313 is a distinction made between coastal and inland waters. On the contrary, the statute speaks to "all tracts or parcels of land together with all accretions thereto . . . lawfully and expressly acquired by the United States . . ."¹¹ Indeed, section 1311(a) grants to the states "the lands beneath navigable waters within the boundaries of the respective States," which is defined by section 1301(a)(1) to be "all lands within the boundaries of each of the respective States which are covered by nontidal waters that were navigable under the laws of the United States at the time such State became a member of the Union . . ." In turn section 1313(a) excepts from the operation of section 1311 "all tracts or parcels of land together with all accretions thereto." As *California ex rel. State Lands Commission v. United States* taught, it is this reservation which resolves the issue of the source of the rule of decision. By its terms the statute makes no distinction between coastal and inland waters. The Ninth Circuit put the proposition as follows: "Confirming prior case law, the Submerged Lands Act of 1953, 67 Stat. 29, 43 U.S.C. § 1301(a)(1), in effect quit

the virtue of being a later expression of the Supreme Court's view than *Watt v. Alaska*, 451 U.S. 259 (the 1981 case relied on by this court in *Consortium of Community Based Organizations*) or *Busic v. United States*, 446 U.S. 398 (the 1980 case relied upon by this court in *United States v. Veon*). Ours is a three level judicial system, reflecting the functions of each court. Thus, district courts decide cases, courts of appeal review for error, and the United States Supreme Court teaches. For obvious reasons, no court can strictly restrict itself to its paradigmatic role; nonetheless the system depends on each court being attentive to its primary responsibility while dispatching its other duties.

¹¹ Although the specific language relied upon by the court to determine that Congress spoke to this issue appears to relate solely to land "acquired by the United States" the Supreme Court definitively determined that "accretions to retained land should be similarly excepted from the grant to the States." *California ex rel. State Lands Commission v. United States*, ____ U.S. ___, 102 S.Ct. at 2438 n.11.

claims to the states ‘ . . . all lands . . . covered by nontidal waters that were navigable under the laws of the United States at the time such State became a member of the Union, . . . up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction . . . ’ ” *United States v. Claridge*, 416 F.2d 933, 934 n.1 (9th Cir. 1969) (dictum). While to coin a phrase, much water has passed over the dam since 1969, the circuit’s dictum wholly accords with, and indeed is compelled by, the subsequent decision of the Supreme Court in *California ex rel. State Lands Commission v. United States, supra*.

The State’s suggestion based on legislative history also seems in error. It argues that, since the Submerged Lands Act did not “create substantive property rights with respect to ownership of lands underneath inland waters, it can provide no independent basis for the application of federal law in this case.” Memorandum of State of California, p.7. The State, relying upon the legislative history (see n.9), argues that its acquisition of the lands underlying the inland waters was unaffected by the Submerged Land Act and, accordingly, the littoral rights of the United States were unaffected by the Act. The State’s argument begs the question. The issue is not whether the Submerged Lands Act affected the initial grant to the State of the lands underlying the inland waters, but what changes effected by accretion have upon the title originally acquired. As to this question, the Supreme Court has taught that the reservation of accretions in section 1311 is dispositive. In effect, the State’s argument is simply a disguised way of saying that the Supreme Court’s decision in *California ex rel. State Lands Commission v. United States* is wrong. This court is, of course, simply not free to make such a judgment.

Nor may the State take solace in the fact that the specific ruling of the Supreme Court in *California ex rel. State Lands Commission v. United States, supra* was cast in terms of coastal lands. No negative pregnant can be fairly inferred from that fact. The Court was speaking, as courts do, to the case that was then before it—namely coastal lands. The question considered here is not whether the court spoke to inland waters, but whether the statute does. It seems clear that the same reasoning employed by the Supreme Court in *California ex rel. State Lands Commission*

v. *United States* compels a conclusion that it does. To paraphrase the specific holding of the United States Supreme Court in *California ex rel. State Lands Commission v. United States* so that it applies to the issue before the court, the rule is that “[t]he Act also confirmed the title of the States to the [land under the inland waters] up to the line of [the] mean high [watermark]. Section 5 of the Act, however, withheld from the grant to the States all ‘accretions’ to [lands littoral thereto] acquired or reserved by the United States. 43 U.S.C. § 1313(a). In light of this provision, borrowing for federal law purposes a state rule that would divest federal ownership is foreclosed. In *Wilson*, where [the Supreme Court] did adopt state law as the federal rule, no special federal concerns, let alone a statutory directive, required a federal common law rule.” *California ex rel. State Lands Commission v. United States*, 102 S.Ct. at 2438-39.

B. Inland versus Tideland Waters

The State also argues that the Supreme Court, in *California ex rel. State Lands Commission v. United States*, relying on *Hughes v. Washington*, 389 U.S. 290 (1967), found that the “federal government’s international relations interest in the territorial sea remains sufficiently different to justify a federal common law rule of riparian ownership along the oceanfront.” Memorandum of State of California regarding *California ex rel. State Lands Commission v. United States* p.5. The State thus seeks to distinguish *California ex rel. State Lands Commission v. United States* on the basis that the Supreme Court in that case dealt with the “special” need for a federal rule arising out of the international character of ocean front land. It then argues that “[t]his special federal concern over boundaries to coastal lands is absent in the Mono Lake title case.” Memorandum of California re *California ex rel. State Lands Commission v. United States* p.5 In their briefs neither the United States nor intervenors directly confront this issue. Rather, they simply argue that under *California ex rel. State Lands Commission v. United States* all property rights in which the United States is the holder of title are to be governed not only by federal law, but by the federal common law.

At first blush the distinction which the State seeks to draw based upon whether or not the disputed lands are littoral to the

coast or inland waters seems not implausible. Moreover, it is certainly true that in sketching the historical evolution of the choice of law question, the Court noted that *Hughes* was premised on the international character of the sea which lapped the tideland. *California ex rel. State Lands Commission v. United States*, 102 S. Ct. at 2437. Nevertheless, California's distinction cannot stand, for as the Court noted, the international character of the ocean was but one of many premises which may require displacement of state law. The question, as the Court noted, is not whether the lands are coastal but whether there is any "principle of federal law requiring state law to be displaced." *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 371 (1977), quoted in *California ex rel. State Lands Commission v. United States* at 102 S.Ct. at 2437. To this question *California ex rel. State Lands Commission v. United States* supplied the answer. Federal law applies to determinations of title "where the [United States] government has never parted with title and its interest in the property continues." *Id.* Nonetheless, California can and does argue that while this interest requires application of federal law, it cannot be the determining factor as to whether in applying federal law it should adopt the state law as the rule of decision. To so hold, it argues, would mean that *Wilson v. Omaha Indian Tribe*, 442 U.S. 653 (1979) was wrongly decided. Yet it notes such a proposition is not even remotely suggested in *California ex rel. State Lands Commission v. United States*.

In *Wilson* an inland water was in issue rather than tideland. Moreover, in *Wilson* the riparian owner was the United States. Under these circumstances the Court found that federal law must be applied but nonetheless it found no impediment to incorporating the state's definitions of avulsion and accretion as the federal rule of decision. From all this, California concludes that *California ex rel. State Lands Commission v. United States* is limited to tidelands cases and as to inland waters this court should proceed to apply the three pronged *Wilson* test and as a result thereof apply California law.

Certainly it is true that a factual distinction between *Wilson* (where state law was incorporated as the rule of decision) and *California ex rel. State Lands Commission v. United States*

(where federal common applied) is that the latter dealt with tidelands and the former with inland waters. Nonetheless, it does not appear to this court that the Supreme Court in *California ex rel. State Lands Commission v. United States* recognized this as a factual distinction of any consequence, or relied upon it as a way of distinguishing that case from *Wilson*. On the contrary, the Court seemed to disregard such a distinction observing that, “[f]or over one hundred years it has been settled under federal law that the right to future accretions is an inherent and essential attribute of the littoral or riparian owner.” *California ex rel. State Lands Commission v. United States*, 102 S.Ct. at 2439. Significantly in this regard the Court cited, among other cases, two Supreme Court cases which dealt with inland waters—*St. Clair County v. Livingston*, 23 Wall 46 (1874) (Mississippi River) and *Jefferis v. East Omaha Land Co.*, 134 U.S. 178 (1890) (Missouri River). Thus it may be concluded that the federal common law of accretions is equally applicable to coastal and inland waters.

If, then, federal principles of choice of law require application of federal law to title questions involving land held by the United States, and if the location of the waters is not the basis for determining whether state or federal common law principles supplies the rules of decision, the question remains—what distinguishes *Wilson* from *California ex rel. State Lands Commission v. United States*? It appears to this court that there are several legally significant distinctions. First and foremost, of course, is that in *California ex rel. State Lands Commission v. United States* as here, Congress has spoken. (See Section II A, *supra*.) A second distinction is found in the nature of the legal questions at issue in those two cases.

In *Wilson* the Court indicated that there was no need to fashion “a uniform national rule to determine whether changes in the course of a river affecting riparian land owned or possessed by the United States . . . have been avulsive or accretive.” 442 U.S. at 673. That is, the issue being considered there was “the rules that will identify and distinguish between avulsions and accretions.” *Id.* In *California ex rel. State Lands Commission v. United States*, however, as in the instant case, the issue is not what rules will distinguish avulsions from accretions (relictions) but, rather,

what affect such changes, once identified, will have upon title. It is the latter issue, tendered in *California ex rel. State Lands Commission v. United States* (and here), which requires application of a uniform federal rule. That is to say, title to federal property is a federal interest sufficiently great that only a federal rule may apply. Put another way, state law may not be applied to directly divest the United States of title. "We hold the true principle to be this, that whenever the question in any court, State of federal, is *whether* a title to land which had once been the property of the United States has passed, that question must be resolved by the laws of the United States." *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 at 377, quoting *Wilcox v. Jackson*, 13 Pet. 498, 517 (emphasis is added by the *Corvallis* court). On the other hand, the issue to be resolved in *Wilson* (how to determine whether a change was avulsive or accretive), was not directly determinative of title. Rather, it was an intermediate legal issue and thus arguably one of those questions appropriate for borrowing from state law to fill "intersticial" gaps in federal law. See *DelCostello v. Teamsters*, ___ U.S. ___, 76 L.Ed.2d 476, 485 n.13 (1983).¹² Such intermediate questions, while they may bear on resolution of questions of title, are not directly capable of divesting the federal government of its title. See *Wilson*, 442 U.S. at 673.

¹² I recognize that in *DelCostello* the Supreme Court was considering the "interstitial gaps" created in federal law by congressional enactment and was thus presented with a somewhat different problem. Nonetheless, since *Erie v. Tomkins*, 304 U.S. 64 (1938), the "instances [for application of federal common law] are 'few and restricted'." *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963), quoted in *Texas Industries, Inc. v. Radcliff Materials*, 451 U.S. 630, 640 (1981). By virtue of this limited scope of federal common law, the instances in which the courts engage in the process of its development also tend to be limited. Thus the federal common law, since it is declared in fits and starts, also has developed "interstitial gaps." The existence of these gaps must be filled as cases present themselves to be resolved; such issues appeal equally to resolution by resort to state law when state law is not in conflict with federal interests.

I conclude, then, that a second basis of harmonizing the results in *Wilson* and *California ex rel. State Lands Commission v. United States* is an examination of the question tendered. Where title to property of the United States is directly in question, not only must federal law govern, but federal common law supplies the rule of decision. For questions subsidiary to title itself, and where non-hostile state law can fill a gap in the federal law, state law may supply the rule of decision.

The above formulation also suggests a third distinction between *Wilson* and *California ex rel. State Lands Commission v. United States*—namely the existence of a gap. The question tendered in *California ex rel. State Lands Commission v. United States* (the ownership of accreted lands) was well settled under federal common law. The Court described the doctrine as settled under federal common law “for over one hundred years.” *California ex rel. State Lands Commission v. United States* at 102 S.Ct. at 2439. As to the matter of whether or not changes are avulsive or accretive, the issue considered in *Wilson*, the Court seemed to suggest that such a determination would require the fashioning of a federal common law, i.e., that the law was not already in place. As the Ninth Circuit recently described the situation, “[a]lthough the court found federal common law controlling, it refused to promulgate a general federal common law rule of accretion and avulsion.” *United States v. Harvey*, 661 F.2d 767, 770 (9th Cir. 1981).¹³ Thus the existence of a federal common law in *California ex rel. State Lands Commission v. United States*, was a factor militating in favor of its application, while the need to fashion federal common law principles concerning a

¹³ The Supreme Court described the decision below as “[r]eviewing what it perceived to be the federal common law of accretion and avulsion....” *Wilson*, 442 U.S. at 662. Later the Court observed that “The Court of Appeals, noting the existence of a body of federal law necessarily developed by this Court in the course of adjudicating boundary disputes, . . . purported to find in those doctrines the legal standards to apply . . . in this case . . . The federal law applied . . . however, does not necessarily furnish the appropriate rules to govern in this case.” 442 U.S. at 672.

subsidiary issue in *Wilson* suggested that resort to state law was not unwarranted.¹⁴

C. Summary

I conclude that *California ex rel. State Lands Commission v. United States* and *Wilson* are fully harmonious. Moreover, this case is indistinguishable in any meaningful fashion from the issues resolved in *California ex rel. State Lands Commission v. United States*. Accordingly, under binding precedent, federal law applies in resolution of this matter, and federal law provides the source of the federal rule of decision.¹⁵

¹⁴ It is not clear that the Ninth Circuit considers the existence of a well established federal common law a significant factor in resolving rules of decision issues. In a recent case relating to the Miller Act, the Court recognized "that there is no question that federal law governs actions brought under the Miller Act." Nonetheless, it observed that "for resolving a given issue, the court *may* look to state law 'as a matter of convenience and practicality.'" It then reversed the district court for failing to treat the "may" as a must and applying state law inconsistent with the existing federal common law. See *United States for the Use of United Electric Corporation v. National Bonding*, ____ F.2d ___, Nos. 82-4365, 82-4380, slip op. at 3153 n.2 (9th Cir. May 10, 1983). I am uncertain as to what legal principle is to be derived from *National Bonding*. Nonetheless the court takes comfort in the fact that the circuit was addressing the problem in the context of the Miller Act and thus *National Bonding* may have no application to the instant issue. In any event, given that this court's harmonizing of *Wilson* and *California ex rel. State Lands Commission v. United States* also rests on the nature of the issue tendered, and the existence of an applicable federal statute, *National Bonding* would not appear to compel a different result.

¹⁵ Indeed, even if *California ex rel. State Lands Commission v. United States* did not compel this result, it is not apparent that it would be proper in the instant case to borrow California's rule. California's rule provides that, where man made conditions have created the reliction, and the boundaries of state lands are in question, the accretions become the property of the state. Thus in every instance of a dispute between the United States and the state over artificially created relictions the state would prevail. Such a rule is hardly the kind of "even handed" rule which would permit application of state law as a rule of decision. *Wilson*,

II RELICTION AND TITLE

The United States asserts that the land in issue is relicted and desires this court to declare that under federal common law, relicted lands belong to the upland owner. I turn first to the state of the record.

The State of California argues that there is an inadequate factual basis to determine whether the land is relicted in that such a determination involves both the rate of exposure and its perceptability. *See* n.1, and *see Report of Special Master Charles Fahy in State of Utah v. United States*, filed March 19, 1974.¹⁶ The sole evidence as to the speed of the water's recession is to be found in the Task Force report (one to two feet per year). There appears to be no evidence before the court as to the perceptability of the recession. Even though California has declined to state whether the lands in issue are relicted, the United States cannot prevail on this record. Before an opposing party is required to come forward with evidence, the moving party must establish facts sufficient to show "that there is no genuine issue as to any material fact." Fed.R.Civ.P. 56(c). Here, because there is no evidence on the crucial issue of perception, the court cannot find a sufficient factual basis to determine whether the lands in issue are relicted. Accordingly, that portion of the Government's motion must be denied. Nonetheless, for the reasons explained below, I

442 U.S. at 673. Indeed it appears to this court that it is more than arguable that such a rule is hostile to the interests of the United States. Moreover, the State recognizes that its rule is essentially unique throughout the states. Under such circumstances it also appears that the California rule should not be borrowed. "Although state law may be borrowed if appropriate, 'specific aberrant or hostile state rules do not provide appropriate standards for federal law.'" *North Dakota v. United States*, ____ U.S. ___, 103 S.Ct. 1095, 1105 (1983), quoting *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 596 (1973).

¹⁶ A subsequent report of the Master is to be found at 1976 Utah Law Review 246. Unfortunately the report cited in text apparently has not been published anywhere. A copy was filed in this case by the Sierra Club and judges of this circuit may obtain copies through the Ninth Circuit Library.

believe it proper for the court to resolve at this stage of the proceedings the purely legal question of who has title to relicted lands under federal common law.

As has been observed “[s]ubdivisions (a) and (b) of Rule 56 authorize a motion for summary judgment ‘upon all or any part’ of a claim by a claimant or a defending party. In addition, Rule 56(d) deals with the situation in which a motion does not lead to a judgment on the entire case but only terminates further contest as to a portion of the litigation.” 10A Wright, Miller & Kane, *Federal Practice and Procedure*, § 2736 at 446 (2d ed. 1983). The entire purpose of partial adjudications is to expedite litigation. *E.I. Du Pont De NeMours & Co. v. U.S. Camo Corp.*, 19 F.R.D. 495 (D.C. Mo. 1956). “An order under Rule 56(d) narrows the issues, enables the parties to recognize more fully their rights and yet permits the court to make one complete adjudication on all aspects of the case when the proper time arrives.” *Woods v. Mertes*, 9 F.R.D. 318, 320 (D.C. Del. 1949). “Inasmuch as it narrows the scope of the trial, an order under Rule 56(d) has been compared to a pretrial order under Rule 16.” 10A Wright, Miller & Kane, *Federal Practice and Procedure* § 2737 at 459. Under these . . . *Copy Missing* . . .

Property 15.26 (A.J. Casner Ed. 1952).¹⁷ Because accretions are much more common than reliction, most of the cases that are considered by both parties are accretion cases.

The federal rule relating to accretions is clear and of ancient character. As the Supreme Court observed “For over 100 years it

¹⁷ The parties apparently do not recognize the irony of ascertaining the federal common law rule that accretions and relictions are treated similarly by resort to state law. See *Oregon v. Corvallis Sand & Gravel*, 429 U.S. 363, 380 n.8 distinguishing between the term “common law” in its “generic sense” and federal common law. It is comforting to note that there are indeed federal cases that also recognize that the two processes as legally synonomous. See, e.g., *Walton v. United States*, 415 F.2d 121, 124 (10th Cir. 1969); *James v. Langford*, 701 F.2d 123, 126 (10th Cir. 1983); *Uhlorn v. U.S. Gypsum Co.*, 366 F.2d 211, 218 (8th Cir. 1966); *Humble Oil & Refining Co. v. Sun Oil Co.*, 191 F.2d 705, 715 (5th Cir. 1951).

has been settled under federal law that the right to future accretions is an inherent and essential attribute of the littoral or riparian owner. [citations omitted] 'Almost all jurists and legislators—both ancient and modern, have agreed that, the owner of the land thus bounded is entitled to these additions.' [citation omitted]" *California ex rel. State Lands Commission v. United States*, 102 S.Ct. 2432, 2439 (1982). As the Ninth Circuit observed "Under the federal and common law rule, land formed by a process of accretion, or gradual deposition of soil upon the shore of an upland bounded by water, belongs to the upland owner." *United States v. Aranson*, 696 F.2d 654, 659 (9th Cir. 1983). Indeed, in dictum the Ninth Circuit has specifically recognized that under the federal law, such is the rule of reliction. "Under the general application of this doctrine, land which becomes exposed by the gradual recession of water belongs 'to the riparian owner from whose shore or bank the water has receded . . .' [citations omitted]." *United States v. Ruby Company*, 588 F.2d 697, 701 n.4 (9th Cir. 1978).¹⁸ Clearly, this rule is not restricted solely to tideland waters, but reaches inland waters as well. See *Aranson*, *supra* (the Colorado River). The court thus finds that under federal common law, relicted land becomes the property of the owner of the lands littoral to the receding body of water.¹⁹

¹⁸ Judge Fahy, relying on *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973), also advised the Supreme Court that federal common law provides that the relicted land is the property of the "riparian proprietor of land bounded by a stream." Report of Special Master, p. 11.

¹⁹ The State of California has asked this court to declare what the law of California is as to relicted lands. Because the court has determined the federal common law governs this action, that law is irrelevant to the instant litigation. Accordingly, the court does not see how such a declaration will narrow the issues or otherwise serve any of the salutary purposes of partial adjudication under Rule 56, and declines to do so.

CONCLUSION

The court grants partial adjudication of these issues in this litigation as follows:

1. Federal law provides the rule of decision in this case.
2. Where, by virtue of the process of reliction, lands are exposed which were previously covered by navigable waters, they belong to the riparian owner from whose shore or bank the water has receded.

IT IS SO ORDERED.

DATED: August 31, 1983.

/s/ LAWRENCE K. KARLTON

Lawrence K. Karlton, Chief Judge
United States District Court

Appendix C

United States District Court
Eastern District of California

No. Civil S-80-696 LKK

State of California, ex rel.
State Lands Commission,
Plaintiff,

v.

United States of America, et al,
Defendants.

Findings of Fact and Conclusions of Law

[Filed April 3, 1985]

FINDINGS OF FACT

1. Mono Lake lies immediately east of the Sierra Nevada in eastern California, occupying the lowest portion of the Mono Basin. As of October 1, 1984, the lake covered an area of 68 square miles, or approximately 10 percent of the total basin.

2. Mono Lake is a terminal lake with no outlet, which means that fresh water entering the lake is lost only to evaporation. Small amounts of salts in the fresh water have accumulated in the lake, and have been concentrated by evaporation to make the lake saline.

3. The United States owns a substantial portion of the uplands around the lake.

4. Mono Lake is hydrologically dynamic, i.e., it responds to climatological factors that affect the amount of water stored in the lake. Since 1919 the level of the lake has been generally declining due to a variety of factors.

5. Primarily because it is located in a "closed" basin and lacks an outlet, Mono Lake has experienced constant and sizeable fluctuations in lake levels, both before and after diversions commenced in 1940. At the time of the federal meander survey in 1855-57, the level of the lake was approximately 6407 feet above

mean sea level. In 1919, the lake reached its historic high stand, about 6428 feet. In 1940, the year that diversions commenced, see 6, below, the level of the lake was approximately 6417 feet. In 1981, the lake reached its historic low stand, 6372 feet. By early 1984, the lake had returned to an elevation of approximately 6381 feet, and today it stands at approximately 6380 feet.

6. Since 1940 the City of Los Angeles has diverted water from Mono Basin for municipal use. Water is diverted from Lee Vining Creek, Walker Creek, Parker Creek, and Rush Creek. These diversions have increased since 1971 when the "second barrel" of the Los Angeles aqueduct came into operation, and since then have averaged 92,500 acre-feet per year, as compared to 56,900 acre-feet per year average for the period 1941-1970. Since the diversions began in 1940, the lowest level reached by the lake was 6372.00 feet in December, 1981.

7. Prior to 1940, the lake fluctuated over a range of 24 feet (from 6404 feet to 6428 feet). After 1940, the lake has fluctuated over a range of 46 feet (from 6372 feet to 6418 feet). Although from time to time the fluctuation of the lake has remained within a relatively small range for periods of several years, the lake has never stabilized. At no time has the lake attained what can be described as a "typical" or "normal" water level.

8. The court incorporates herein the undisputed statement of facts prepared by the parties.

9. The level of Mono Lake under natural conditions represents a balance between inflows (streamflow, groundwater and precipitation) and outflow (evaporation). Levels fluctuate in response to daily, seasonal, and cyclical variations in inflow and evaporation.

10. The highest annual lake levels occur usually in late spring and the lowest level tends to occur about November, the end of the period of highest summer evaporation and minimum streamflow.

11. The lake level fluctuates about one-half to three-quarters of a foot annually as a result of these natural, seasonal fluctua-

tions, but may fluctuate at a substantially greater or lesser amount.

12. Daily changes in lake level range from a decline of 0.02 feet to an increase of 0.016 feet per day for 90% of the changes during the period 1940-1984. For this period, 0.02 feet, the maximum decline at the 90% level, is almost precisely the amount of the diurnal variation due to evaporation on a hot summer day at Mono Lake -0.22 inches (.334 inches x .66), or 0.018 feet.

13. Since 1978, runoff in Mono Basin has averaged 130% of mean runoff over the years since 1934. As a result, the rate of decline of the water level at Mono Lake lessened and, since 1981, the lake has risen more than 8 feet due to above normal precipitation, resulting primarily in higher runoff from the melting snowpack, and greatly reduced diversions by the City of Los Angeles.

14. The physical dimensions of Mono Lake are shown in the following table:

PHYSICAL DIMENSIONS OF MONO LAKE

<u>Date</u>	<u>Elevation, feet, MSL, USGS datum</u>	<u>Surface Area, acres</u>	<u>Volume million acre-feet</u>	<u>Length miles</u>	<u>Width miles</u>
Present Lake					
Oct. 1, 1984	6380.15	43,000	2.45	12.5	8.75
Highest Recorded					
July 18, 1919	6428.07	56,700	5.0	13.5	9.5
Lowest Recorded					
December 17 and 30, 1981..	6372.00	36,700	2.1	11.75	8.25

15. During the past 3500 years the surface of Mono Lake has fluctuated in irregular cycles of roughly 200 years over a vertical range of more than 130 feet in response to variations in climate and, since 1940, diversions by Los Angeles. The maximum lake level of record was 6428.07 feet in July 1919. The water level as of September 26, 1984, was 6380.15 feet m.s.l. During the past 2000 years, under natural conditions, the lake has dropped below 6380 feet m.s.l. four times, and has fallen to 6370 feet or below three times. Thus, the present level of the lake is within the range of fluctuations seen in the recent geologic past.

16. Mono Lake is apparently in that part of the cycle which, but for the diversions by the City of Los Angeles, would result in higher lake levels.

17. The lake will continue to fluctuate in level due to seasonal and climatic variations, with diversions by the City of Los Angeles being a major controlling factor in future lake levels.

18. Assuming a continuation of the past climatic conditions and a diversion of 100,000 acre-feet per year by Los Angeles, the lake would stabilize in the year 2147 at an elevation of 6336 feet, some 112 feet above the measured deepest point of Mono Lake. At that point the lake would occupy an area of 40 square miles.

19. Although there has been a general and significant decline of 37 feet in the level of Mono Lake since the diversions by the City of Los Angeles began in 1940, there has been little difference in the rate of movement of the Lake level when compared with pre-1940 rates. Both before and after 1940, 90% of the decline of lake levels within a month were 0.4 feet or less; within a week they were 0.12 feet or less.

20. Nonetheless, after the diversions began the amount of decline was greater. For each year that the lake declined in comparison with the previous year, the average amount of decline through 1940 was about 0.8 feet per year; after 1940 the amount of decline increased to an average of 1.6 feet per year. Taking into consideration both declines and increases, after 1940 the change in lake levels amounted to an average decline of about 0.84 feet per year.

21. Similarly, 90% of the daily negative elevation changes since 1940 have been 0.02, or less, feet.

22. Two significant declines since the high stand of 1919 have resulted in exposure of land around Mono Lake. The first decline, from 1919 to 1935, was caused by drought. The second, from 1945 to 1981, was caused primarily by diversions of streamflow to Los Angeles. Climatological factors contributed to the later decline in the sense that the diversions took place during a period of significantly below-average precipitation during many of those years.

23. Perceptibility of change in lake levels is dependent upon a number of factors. The amount and rate of change in the level of Mono Lake in relation to the slope of the shore zone where the change in water level is occurring is one significant factor; the flatter the slope, the greater the horizontal movement of the water's edge with a change in level. Other factors include the entire setting in which the observation of movement would be made and the presence of an easily recognized, stationary and distinctive mark at the shoreline, and the nature of the edge of the shore, whether straight and even or irregular and discontinuous.

24. The slope of the land surrounding and underlying Mono Lake may be depicted in a number of ways including contour maps depicting the slope of the exposed lands (topographic maps) and of the bed of the lake (bathymetric maps). A further depiction may be obtained from slopes calculated from profiles selected at various locations around Mono Lake.

25. The gentlest slopes in the Mono Basin associated with the lake occur between elevation 6385 and elevation 6368 on the lakebed. Below that elevation, the bed of the lake steepens into its depths. Accordingly, the rates of shoreline migration that have occurred with fluctuations in the water level since 1972, when the water level fell below 6385 feet, are larger than those which would occur above 6385 feet or below 6368 feet.

26. A representative set of 26 land surface profiles, plus one profile depicting the steepest slopes and one of the shallowest was developed for trial. The representative set was selected systematically by locating points on the shoreline (6372.67) to intervals of 6000 feet beginning at an arbitrarily chosen point on the south shore. Twenty-two profiles were located on the mainland shore, and an additional four on the Pahoa shore. The location of the representative set and an additional 12 profiles placed by the State to measure only the flattest slopes it could identify are shown on Court Exhibit (CE) 8, also shown as fig. II-8 in CE 2a.

27. For purposes of describing the physical attributes of a natural object, a representative series of measurements may be used.

a. In this instance, the slope conditions at Mono Lake were depicted by use of a representative set of 26 profiles which provided, at least in a gross sense, a statistical representation of the slopes over the entire range of water movement that has occurred at Mono Lake since statehood in 1850, including the high stand of the lake in 1919 at 6428.07 feet.

b. Slopes may be described in terms of their gradient, the rate of ascent or descent. The parties have chosen to state gradient in number of feet of descent per one thousand feet, and have calculated a gradient for the distance between each contour. The method of calculation used by the court appointed expert, by measuring the amount of gradient per horizontal distance of 1000 feet is an accepted engineering method.

28. Gradients of all of the segments of the representative set, profiles 1-26 (excluding the steepest and flattest profiles 27 and 28) range from 0.8 feet/1000 to 733 feet/1000, and averages 76 feet/1000.

29. The State selected certain slopes which showed some of the gentlest slopes. Although the State used a method different from the court appointed expert's for calculation, it was neither arbitrary nor capricious.

30. In general, land surface gradients on the western shore of Mono Lake are steeper than those on the eastern shore. The average gradient of western profiles is about 65 feet/1000 and of eastern profiles about 21 feet/1000.

31. The apparent rate of migration of the lake shoreline caused by a change in lake level can be calculated if the lake change and the beach slope are known. A lake level change of 0.02 feet/day for post-1940 conditions encompasses 90% of all of the daily declines since 1940. The shoreline migration rate is 0.30 feet per day for the steeper, west side of Mono Lake, and 0.32 feet per day for the gentler, east side. A shoreline migration rate of 0.31 feet per day for the west side of Mono Lake and of 1.389 feet per day for the east side is representative of shoreline exposure rates.

32. The average person, in a position to observe shoreline migrations at Mono Lake, would not have observed the movement of the shoreline as it was occurring.

33. The parties have agreed that the meander line, as surveyed by Von Schmidt in 1856-57, is the best evidence of the location of the ordinary high water mark at the time of Statehood in 1850, and is found generally at approximately elevation 6407 feet m.s.l.

34. The occurrence of upland vegetation close to the present shoreline of a body of water is an aid to a surveyor in determining the location of the present ordinary high water mark, which separates the bed of the lake from uplands.

35. There is vegetation along the west and southwest shore of Mono Lake. There is virtually no vegetation, however, along 60-70% of the shoreline of Mono Lake at the water's edge. This unvegetated area includes uninterrupted miles along the north and east shores of the lake. The only continuous vegetation line around the Lake is at the historic high stand of the lake, 6428 feet above sea level.

36. The absence of vegetation is in part due to the highly alkaline and saline soils on the exposed lake bed. As to some of the area, as much as 70 years may be required to leach the soils. Much of the areas near the water's edge that are vegetated result from fresh water springs and seeps that more rapidly leach the soils.

37. Other physical indicia used by surveyors for determining an ordinary high water mark are topographic features that have been impressed as a result of a water body's constant presence. These indicia include erosional features such as shelves or benches, or depositional features such as berms.

38. A surveyor can use beach features other than those created by standstills in identifying a OHWM.

39. The process of revegetation in some areas can occur on the exposed land in as short a period of time as one calendar year from the time the lands are exposed by the receding water. Upland vegetation at Mono Lake has at places reestablished itself

within one year's time. The vegetation is permanent and is self-reproducing unless it is inundated by rising water. The rising water over the past two years has reinundated areas heavily revegetated since becoming exposed in 1978-1981, creating at places a sharp demarcation between the uplands with terrestrial vegetation and the bed along the shore at Mono Lake.

40. Both vegetation and soil tests are applied by surveyors in ascertaining the present location of an ordinary high water mark (OHWM). Where the presence of salts, rocks, or other physical conditions make the determination of the OHWM impractical at a particular location, surveyors will extend a line between readily observable OHWM locations by a plane which parallels the water surface. On a river, this line would parallel the grade of the river; on a lake, the surface of the lake.

41. Seasonal and daily changes in the water level do not result in a change in the OHWM because such changes are not sufficiently permanent to permit development of the physical indicia of an OHWM based on vegetation changes and beach features.

42. Where water levels decline, as they had at Mono Lake until 1981, depending on soil and water conditions, vegetation gradually colonizes the newly exposed bed of the lake. Where the water levels are rising, encroachment of the water onto vegetated areas kills the vegetation.

43. At Mono Lake, beach berms and other shoreline features that can be used by a surveyor to locate an OHWM become better developed during periods of a relative stillstand of the lake. The longer the stillstand, the better developed are the beach features. The lake has been at a stillstand several times during the past 65 years, during which well developed beach features were formed. These periods occurred from 1917 to 1924, 1939 to 1948, 1951 to 1953, 1965 to 1971 and, most recently, from 1977 to 1982.

44. Given the methods accepted in the field, a surveyor using standard techniques could locate the present OHWM.

45. The hydrology and shoreline migration between Mono Lake and Great Salt Lake are profoundly different.

46. The most significant difference between the Great Salt Lake and Mono lake is in the comparison of shoreline migration rates. Shoreline changes at Great Salt Lake average 15.3 feet/day (based on an average lake level change of 0.058 feet/month and average gradient of 0.126 feet/1000 feet). By contrast, during the period 1940-1980, slope migration rates at Mono Lake averaged only 0.31 feet/day on the west side of the lake and 1.389 feet/day on the east side, only 2% and 9% respectively of the migration rate at Great Salt Lake.

CONCLUSIONS OF LAW

1. This court has jurisdiction over this matter pursuant to 28 U.S.C. § 1346(f). Venue in this court is proper pursuant to 28 U.S.C. § 1402(d).
2. At the time of statehood, California became the owner of the bed of Mono Lake below its ordinary high water mark.
3. Since statehood, the United States has owned a substantial portion of the land upward from the boundary which existed at statehood.
4. Each party to this quiet title action has the burden of establishing its affirmative claim of title. Accordingly, California has the burden of establishing that the boundary relocated above its statehood position; the United States has the burden of establishing that the boundary between state and federal lands is below its statehood location.
5. The term "reliction" refers to the gradual and imperceptible uncovering of land by the lowering of water rather than sudden or seasonal exposure of the land. *California, ex rel. State Lands Commission v. United States*, (E.D. Cal., Sept. 1, 1983) (Order granting partial adjudication); see *United States v. Ruby Co.*, 588 F.2d 697, 701 (9th Cir. 1978); 93 C.J.S. Waters Sec. 78.
6. Under long-established federal law, lands formed through the process of reliction, whatever its cause, belong to the upland owner as an inherent and essential attribute of ownership. *California ex rel. State Lands Comm. v. United States*, 457 U.S. 273, 278, 284, 285, 288 (1982); *Hughes v. Washington*, 389 U.S. 280,

293 (1967); *Jones v. Johnston*, 18 How 150, 156-58 (1856); *County of St. Clair v. Lovingston*, 23 Wall. 46, 66-68 (1874); *Jefferis v. East Omaha Land Co.*, 134 U.S. 189-93 (1974); *United States v. Aranson*, 606 F.2d 654, 659 (9th Cir. 1983); *Beaver v. United States*, 350 F.2d 4, 10-11 (9th Cir. 1975); *United States v. Ruby Co.*, 588 F.2d 697, 701 n.4 (9th Cir. 1978).

7. An avulsion occurs when a physical change to the boundary formed by a watercourse occurs suddenly and abruptly. *Philadelphia Co. v. Stimson*, 223 U.S. 605 (1912).

8. There is no "gray area"—a change is either avulsive or accretive; however, there may be a failure of proof as to whether a change is of one character or another. There is no such failure of proof in the instant case.

9. Perceptability does not depend upon whether a person was likely to be at a place when the change occurred but, rather, the characteristics of the change to be seen if a person was at a place where the change was occurring.

10. Analysis of the perceptibility of the changes in water level at Mono Lake for purposes of determining whether the lands are relisted must discount those changes attributable to daily evaporation and seasonal fluctuations.

11. The common law rule, adopted by the courts of the United States, is that only when the change in the water is sudden, or violent, and visible, does title remain unchanged. "It is not enough that the change may be discerned by comparison at two distinct points of time. It must be perceptible when it takes place. 'The test as to what is gradual and imperceptible in the sense of the rule is, that though the witnesses may see from time to time that progress has been made, they could not perceive it while the process was going on.' *St. Clair County v. Lovington*, 23 Wall. 46, 67, 23 L.Ed. 59, 63, 64." *Philadelphia Co. v. Stimson*, 223 U.S. 605, 624 (1912); *The King v. Lord Yarborough*, 107 Eng. Rep. 668 (K.B. 1824).

12. The federal common law doctrine of reliction applies to lakes. *Banks v. Ogden*, 2 Wall, 69 U.S. 57 (1865).

13. The doctrine of reliction controls at Mono Lake in respect to the boundary lines between the State and the United States. See, *California v. United States*, 457 U.S. 273 (1982).

14. In determining that the exposure has been gradual and imperceptible within the meaning of the common law doctrine, this court relied upon the "faculties of average humanity engaged in the transactions of everyday life," and has evaluated the evidence in that light. *Attorney-General v. McCarthy*, 2 I.R. 260, 296 (1911).

15. It is presumed that the boundary changes gradually and imperceptibly by operation of the process of reliction, not the rapid, easily perceived and sometimes catastrophic shifts of land incident to floods, storms or channel breakthroughs that characterize avulsive moments. *Peterson v. Morton*, 465 F.Supp. 986, 999 (D. Nev. 1979), vacated in part and remanded on other grounds, 666 F.2d 361 (9th Cir. 1982); *Pannel v. Earls*, 483 S.W.2d 440, 442 (Ark. 1972); *Murray v. State*, 596 P.2d 805, 815 (Kan. 1979).

16. The presumption that the movement of a water body is by accretion rather than avulsion does not alter the burden of proof. The use of a presumption as evidence to meet a party's burden of proof shifts to the other party the burden of producing evidence to rebut the presumption, but does not shift the burden of persuasion. Fed. R. Evid. 301.

17. The common law doctrine of reliction applies regardless of the amount of land exposed and is not inapplicable because the amount of the reliction, over a period of time, is large. *Attorney-General v. McCarthy*, 2 I.R. 260, 292 (1911).

18. Whether the exposure is the effect of natural or artificial causes makes no difference under the federal common law. *County of St. Clair v. Lovingston*, 90 U.S. (23 Wall.) 46, 66 (1874); *California v. United States*, *supra*, 457 U.S. at 275; *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313, 327 (1973).

19. While federal common law does not require that the recession of water be for all time, it does require that the movement of water not be due to temporary causes such as occur

during the day or with the seasons. *Philadelphia Co. v. Stimson*, 233 U.S. 605, 624 (1912).

20. The lands exposed by the decline in the elevation of the water of Mono Lake since its high stand in 1919 are relicted lands.

21. An inherent attribute of the doctrines of reliction and accretion is that they operate in a dynamic environment, not a static one. *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313, 326 (1973). The reliction of Mono Lake is not ephemeral or seasonal, having continued, with some reversals, since 1919. It thus qualifies as a sufficiently long-term trend to warrant application of the doctrine of reliction.

22. Under federal law, the boundary, the ordinary high water mark, between upland owners and the state-owned bed moves as lands are exposed with the change in water levels. *California v. United States, supra*, 457 U.S. at 278; see also *Bonelli, supra*, 414 U.S. at 315-16, 318. The right to land exposed by the process of reliction is an inherent and essential attribute of the littoral or riparian owner, regardless of cause. *California, supra*, 457 U.S. at 284; *Hughes v. Washington*, 389 U.S. 290, 293 (1967); *County of St. Clair v. Lovingston*, 23 Wall 46, 68 (1874).

23. Actions of federal officials that are inconsistent with the claim of ownership of the relicted lands by the United States do not provide an independent basis for the State of California to claim title. See *California ex rel. State Lands Commission v. United States*, 457 U.S. 273, 276 n.4 (1982).

24. There is no federal common law requirement that the relative interests of the claimants to the exposed lands be weighed in applying the rule of reliction. *California ex rel. State Lands Commission v. United States*, 457 U.S. 273 (1982).

25. The alleged inaction, acquiescence, or passivity of the United States in the face of the declining elevation of the lake is not pertinent to resolution of the question of title to the exposed lands.

26. Since a principal cause of the recession of the waters of Mono Lake has been the upstream diversions of the City of Los

Angeles authorized by permit issued by the State of California, and the United States has not erected artificial structures for the specific purpose of causing a reliction, it is appropriate to apply the federal common law of reliction. *United States v. Harvey*, 661 F.2d 767, 772 n.7 (1981); *Beaver v. United States*, 350 F.2d 4 (1965). The United States may claim title to the exposed land even if it had significant control over its creation. *California, supra*, 457 U.S. at 275.

27. The recession of Mono Lake does not constitute a "drainage" or reclamation project.

28. The United States owns lands lakeward of its uplands from the meander line to the present ordinary high water mark. Because the boundary is ambulatory in a dynamic hydrologic system, there is no need to precisely locate the OHWM by survey except when land may be conveyed by the United States, at which time it may be necessary to meander the property in order to determine the acreage.

ORDER

The State of California's complaint is dismissed with prejudice. Costs are awarded to the United States. Judgment will be entered accordingly.

IT IS SO ORDERED.

DATED: April 3, 1985

/s/ **LAWRENCE K. KARLTON**
Lawrence K. Karlton, Chief Judge
United States District Court

Appendix D

United States District Court
Eastern District of California

No. Civil S-80-696 LKK

State of California, ex rel.
State Lands Commission,
Plaintiff,

v.

United States of America, et al.,
Defendants.

ORDER

[Filed May 13, 1985]

On April 3, 1985, the court filed its Findings of Fact and Conclusions of Law in the above-captioned case. Pursuant thereto, on April 4, 1985, Judgment was entered. On April 8, 1985, the court received a letter from the Sierra Club Legal Defense Fund suggesting that the Findings of Fact and Conclusions of Law as they relate to Finding of Fact No. 31, be amended in that it failed to distinguish between various methods of calculating the lake's migration. The court treated the letter as a motion to amend the judgment pursuant to Fed. R. Civ. P. 59(e) and requested the plaintiff and defendant to reply to the motion. Both the United States and the State of California do not oppose the motion and, accordingly, the court now amends Finding of Fact No. 31 to read as follows:

The apparent rate of migration of the lake shoreline caused by a change in lake level can be calculated if the lake change and the beach slope are known. A lake level change of 0.02 feet/day for post-1940 conditions encompasses 90% of all of the daily declines since 1940. According to the court appointed expert, since 1940 the shoreline migration rate is 0.31 per day for the steeper west side of Mono Lake and 0.32 per day for the gentler, east side. For conditions since 1940, a shoreline migration rate of 0.31 feet per day for the west side of Mono Lake and of 1.389 feet per day for the east side is

more representative of shoreline exposure rates. This latter figure is derived by eliminating steep profile 11 on Negit Island from the average of eastern shore gradiance and deleting the steeper gradiance between 6420 and 6430 feet from the average of eastern shore gradiance.

On April 15, 1985, the court also received a notice of motion and motion to amend the judgment filed by the State of California. The motion seeks to amend the judgment by having the court delete from the order the award of costs to the prevailing party (the United States) and, rather, have the court order that each side bear its own costs. In particular, the State objects to the order if it encompasses payment of expert fees to Dr. Todd.

As to this matter, it was the court's intention to award costs other than the costs relating to Dr. Todd's fees. It was this court's understanding that Dr. Todd's fees were to be shared by the United States and California. To the degree that the order of the court awarding costs included Dr. Todd's fees, the court hereby amends the judgment to exclude fees and costs relating to Dr. Todd's studies and testimony, said fees and costs to be shared equally by the State of California and the United States.

IT IS SO ORDERED.

DATED: May 10, 1985

/s/ LAWRENCE K. KARLTON
Lawrence K. Karlton, Chief Judge
United States District Court

Not for Publication
United States Court of Appeals
for the Ninth Circuit

NO. 85-1965
D.C. NO. C-S-80-696-LKK
State of California, ex rel.
State Lands Commission,
Plaintiff/Appellant,

v.

United States of America,
Donald P. Hodel,* Secretary
of the Interior, et al.,
Defendants/Appellees.

Sierra Club, et al.,
Intervenors.

ORDER
[Filed Jan 30, 1987]

Before: Kennedy, Reinhardt, and Brunetti, Circuit Judges

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

Appendix F**The Submerged Lands Act****§ 1301. Definitions**

When used in this subchapter and subchapter II of this chapter—

- (a) The term "lands beneath navigable waters" means—
 - (1) all lands within the boundaries of each of the respective States which are covered by nontidal waters that were navigable under the laws of the United States at the time such State became a member of the Union, or acquired sovereignty over such lands and waters thereafter, up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction;
 - (2) all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coast line of each such State and to the boundary line of each such State where in any case such boundary as it existed at the time such State became a member of the Union, or as heretofore approved by Congress, extends seaward (or into the Gulf of Mexico) beyond three geographical miles,¹ and
 - (3) all filled in, made, or reclaimed lands which formerly were lands beneath navigable waters, as hereinabove defined;
- (b) The term "boundaries" includes the seaward boundaries of a State or its boundaries in the Gulf of Mexico or any of the Great Lakes as they existed at the time such State became a member of the Union, or as heretofore approved by the Congress, or as extended or confirmed pursuant to section 1312 of this title but in no event shall the term "boundaries" or the term "lands beneath navigable waters" be interpreted as extending from the coast line more than three geographical miles into the Atlantic Ocean or the Pacific Ocean, or more than three marine leagues into the Gulf of Mexico;

- (c) The term "coast line" means the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters;
- (d) The terms "grantees" and "lessees" include (without limiting the generality thereof) all political subdivisions, municipalities, public and private corporations, and other persons holding grants or leases from a State, or from its predecessor sovereign if legally validated, to lands beneath navigable waters if such grants or leases were issued in accordance with the constitution, statutes, and decisions of the courts of the State in which such lands are situated, or of its predecessor sovereign: *Provided, however,* That nothing herein shall be construed as conferring upon said grantees or lessees any greater rights or interests other than are described herein and in their respective grants from the State, or its predecessor sovereign;
- (e) The term "natural resources" includes, without limiting the generality thereof, oil, gas, and all other minerals, and fish, Shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and plant life but does not include water power, or the use of water for the production of power;
- (f) The term "lands beneath navigable waters" does not include the beds of streams in lands now or heretofore constituting a part of the public lands of the United States if such streams were not meandered in connection with the public survey of such lands under the laws of the United States and if the title to the beds of such streams was lawfully patented or conveyed by the United States or any State to any person;
- (g) The term "State" means any State of the Union;
- (h) The term "person" includes, in addition to a natural person, an association, a State, a political subdivision of a State, or a private, public, or municipal corporation.

§ 1302. Resources seaward of the Continental Shelf

Nothing in this subchapter or subchapter 11 of this chapter shall be deemed to affect in any wise the rights of the United States to the natural resources of that portion of the subsoil and

seabed of the Continental Shelf lying seaward and outside of the area of lands beneath navigable waters, as defined in section 1301 of this title, all of which natural resources appertain to the United States, and the jurisdiction and control of which by the United States is hereby confirmed.

§ 1303. Amendment, modification, or repeal of other laws

Nothing in this subchapter or subchapter II of this chapter shall be deemed to amend, modify, or repeal the Acts of July 26, 1866 (14 Stat. 251), July 9, 1870 (16 Stat. 217), March 3, 1877 (19 Stat. 377), June 17, 1902 (32 Stat. 388), and December 22, 1944 (58 Stat. 887), and Acts amendatory thereof or supplementary thereto.

§ 1311. Rights of the States

(a) Confirmation and establishment of title and ownership of lands and resources; management, administration, leasing, development, and use

It is hereby determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are hereby, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof;

(b) Release and relinquishment of title and claims of United States; payment to States of moneys paid under leases

(1) The United States hereby releases and relinquishes unto said States and persons aforesaid, except as otherwise reserved herein, all right, title, and interest of the United States, if any it has, in and to all said lands, improvements, and natural resources; (2) the United States hereby releases and relinquishes all claims

of the United States, if any it has, for money or damages arising out of any operations of said States or persons pursuant to State authority upon or within said lands and navigable waters; and (3) the Secretary of the Interior or the Secretary of the Navy or the Treasurer of the United States shall pay to the respective States or their grantees issuing leases covering such lands or natural resources all moneys paid thereunder to the Secretary of the Interior or to the Secretary of the Navy or to the Treasurer of the United States and subject to the control of any of them or to the control of the United States on May 22, 1953, except that portion of such moneys which (1) is required to be returned to a lessee; or (2) is deductible as provided by stipulation or agreement between the United States and any of said States;

(c) Leases in effect on June 5, 1950

The rights, powers, and titles hereby recognized, confirmed, established, and vested in and assigned to the respective States and their grantees are subject to each lease executed by a State, or its grantee, which was in force and effect on June 5, 1950, in accordance with its terms and provisions and the laws of the State issuing, or whose grantee issued, such lease, and such rights, powers, and titles are further subject to the rights herein now granted to any person holding any such lease to continue to maintain the lease, and to conduct operations thereunder, in accordance with its provisions, for the full term thereof, and any extensions, renewals, or replacements authorized therein, or heretofore authorized by the laws of the State issuing, or whose grantee issued such lease: *Provided, however,* That, if oil or gas was not being produced from such lease on and before December 11, 1950, or if the primary term of such lease has expired since December 11, 1950, then for a term from May 22, 1953 equal to the term remaining unexpired on December 11, 1950, under the provisions of such lease or any extensions, renewals or replacements authorized therein, or heretofore authorized by the laws of the State issuing, or whose grantee issued, such lease: *Provided, however,* That within ninety days from May 22, 1953 (i) the lessee shall pay to the State or its grantee issuing such lease all rents, royalties, and other sums payable between June 5, 1950, and May 22, 1953, under such lease and the laws of the State

issuing or whose grantee issued such lease, except such rents, royalties, and other sums as have been paid to the State, its grantee, the Secretary of the Interior or the Secretary of the Navy or the Treasurer of the United States and not refunded to the lessee; and (ii) the lessee shall file with the Secretary of the Interior or the Secretary of the Navy and with the State issuing or whose grantee issued such lease, instruments consenting to the payment by the Secretary of the Interior or the Secretary of the Navy or the Treasurer of the United States to the State or its grantee issuing the lease, of all rents, royalties, and other payments under the control of the Secretary of the Interior or the Secretary of the Navy or the Treasurer of the United States or the United States which have been paid, under the lease, except such rentals, royalties, and other payments as have also been paid by the lessee to the State or its grantee;

(d) Authority and rights of the United States respecting navigation, flood control and production of power

Nothing in this subchapter or subchapter I of this chapter shall affect the use, development, improvement, or control by or under the constitutional authority of the United States of said lands and waters for the purposes of navigation or flood control or the production of power, or be construed as the release or relinquishment of any rights of the United States arising under the constitutional authority of Congress to regulate or improve navigation, or to provide for flood control, or the production of power;

(e) Ground and surface waters west of the 98th meridian

Nothing in this subchapter or subchapter I of this chapter shall be construed as affecting or intended to affect or in any way interfere with or modify the laws of the States which lie wholly or in part westward of the ninety-eighth meridian, relating to the ownership and control of ground and surface waters; and the control, appropriation, use, and distribution of such waters shall continue to be in accordance with the laws of such States.

§ 1312. Seaward boundaries of States

The seaward boundary of each original coastal State is hereby approved and confirmed as a line three geographical miles distant

from its coast line or, in the case of the Great Lakes, to the international boundary. Any State admitted subsequent to the formation of the Union which has not already done so may extend its seaward boundaries to a line three geographical miles distant from its coast line, or to the international boundaries of the United States in the Great Lakes or any other body of water traversed by such boundaries. Any claim heretofore or hereafter asserted either by constitutional provision, statute, or otherwise, indicating the intent of a State so to extend its boundaries is hereby approved and confirmed, without prejudice to its claim, if any it has, that its boundaries extend beyond that line. Nothing in this section is to be construed as questioning or in any manner prejudicing the existence of any State's seaward boundary beyond three geographical miles if it was so provided by its constitution or laws prior to or at the time such State became a member of the Union, or if it has been heretofore approved by Congress.

§ 1313. Exceptions from confirmation and establishment of States' title, power and rights

There is excepted from the operation of section 1311 of this title—

- (a) all tracts or parcels of land together with all accretions thereto, resources therein, or improvements thereon, title to which has been lawfully and expressly acquired by the United States from any State or from any person in whom title had vested under the law of the State or of the United States, and all lands which the United States lawfully holds under the law of the State; all lands expressly retained by or ceded to the United States when the State entered the Union (otherwise than by a general retention or cession of lands underlying the marginal sea); all lands acquired by the United States by eminent domain proceedings, purchase, cession, gift, or otherwise in a proprietary capacity; all lands filled in, built up, or otherwise reclaimed by the United States for its own use; and any rights the United States has in lands presently and actually occupied by the United States under claim of right;

(b) such lands beneath navigable waters held, or any interest in which is held by the United States for the benefit of any tribe, band, or group of Indians or for individual Indians; and

(c) all structures and improvements constructed by the United States in the exercise of its navigational servitude.

§ 1314. Rights and powers retained by the United States; purchase of natural resources; condemnation of lands

(a) The United States retains all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs, all of which shall be paramount to, but shall not be deemed to include, proprietary rights of ownership, or the rights of management, administration, leasing, use, and development of the lands and natural resources which are specifically recognized, confirmed, established, and vested in and assigned to the respective States and others by section 1311 of this title.

(b) In time of war or when necessary for national defense, and the Congress or the President shall so prescribe, the United States shall have the right of first refusal to purchase at the prevailing market price, all or any portion of the said natural resources, or to acquire and use any portion of said lands by proceeding in accordance with due process of law and paying just compensation therefor.

§ 1315. Rights acquired under laws of the United States unaffected

Nothing contained in this subchapter or subchapter I of this chapter shall affect such rights, if any, as may have been acquired under any law of the United States by any person in lands subject to this subchapter or subchapter I of this chapter and such rights, if any, shall be governed by the law in effect at the time they may have been acquired: *Provided, however,* That nothing contained in this subchapter or subchapter I of this chapter is intended or shall be construed as a finding, interpretation, or construction by the Congress that the law under which such rights may be claimed in fact or in law applies to the lands subject to this subchapter or

subchapter I of this chapter, or authorizes or compels the granting of such rights in such lands, and that the determination of the applicability or effect of such law shall be unaffected by anything contained in this subchapter or subchapter I of this chapter.